Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

(2)

No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

BURCK BAILEY*
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Attorneys for Petitioner

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BINGHAM MCCUTCHEN LLP
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Attorneys for Respondent

* *Counsel of Record*

PETITION FOR CERTIORARI FILED NOVEMBER 2, 2004
CERTIORARI GRANTED FEBRUARY 28, 2005

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASE SUMMARY
U.S. Court of Appeals for the Federal Circuit

Docket Number: 03-1472

LEAD CASE

Short Case Title (Name):	UNITHERM FOOD SYS V SWIFT-ECKRICH
Lower Court/ Agency:	DCT Division:WD/OK
Lower Court#:	01-CV-347
Notice of Appeal Received:	6/30/2003
Notice of Appeal Docketed:	7/2/2003
Certified List Filed:	7/2/2003
Notice of Appeal Filed:	6/20/2003
Fee Paid:	PD
Fee Amount:	$105.00
Receipt No:	

Appendix A

ATTORNEYS BY PARTY AS LISTED FOR THIS CASE

JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	PRINCIPAL ATTORNEY BAILEY, BURCK Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed: 7/30/2003
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY BROWN, DENNIS D. Firm: Fellers, Snider, Blankenship, Bailey & Tippens 321 South Boston, Suite 800 Tulsa, OK 74103-3318 (918)599-0621 - Tel; ext. (918)583-9659 - Fax EOA Filed: 7/30/2003
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY CASTRO, GREG A. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed: 7/30/2003

Appendix A

JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc. Plaintiff-Appellee	OF COUNSEL ATTORNEY WALTERS, JAY P. Firm: Fellers, Snider Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	PRINCIPAL ATTORNEY SCHROEDER, ROBERT A. Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY PASSARELLI, JOHN P. Firm: McGrath, North 1601 Dodge Street, Suite 3700 Omaha, NE 68102 (402)341-3070 - Tel; ext. (402)341-0216 - Fax EOA Filed:8/25/2003

Appendix A

SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY LINDER, LEIGH OTSUKA Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY LEUNG, KEVIN K.T. Firm: Bingham McCutchen 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 (213)680-6400 - Tel; ext. (213)680-6499 - Fax EOA Filed:7/17/2003
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) Defendant-Appellant	OF COUNSEL ATTORNEY ROE, DAVID H. Firm: McGrath, North 1601 Dodge Street, Suite 3700 Omaha, NE 68102 (402)341-3070 - Tel; ext. ( ) - Fax EOA Filed:9/8/2003

Appendix A

UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	PRINCIPAL ATTORNEY BAILEY, BURCK Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003
UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY BROWN, DENNIS D. Firm: Fellers, Snider, Blankenship, Bailey & Tippens 321 South Boston, Suite 800 Tulsa, OK 74103-3318 (918)599-0621 - Tel; ext. (918)583-9659 - Fax EOA Filed:7/30/2003
UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY CASTRO, GREG A. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003

Appendix A

UNITHERM FOOD SYSTEMS, INC. Plaintiff-Appellee	OF COUNSEL ATTORNEY WALTERS, JAY P. Firm: Fellers, Snider, Blankenship, Bailey & Tippens Bank One Tower 100 North Broadway, Suite 1700 Oklahoma City, OK 73102-8820 (405)232-0621 - Tel; ext. (405)232-9659 - Fax EOA Filed:7/30/2003

ADDITIONAL PARTY INFORMATION

PARTY	ADDITIONAL INFO
JENNIE-O FOODS, INC., now known as Jennie-O Turkey Store, Inc.	Plaintiff-Appellee
SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods)	Defendant-Appellant
UNITHERM FOOD SYSTEMS, INC.	Plaintiff-Appellee

Appendix A

LISTING OF BRIEFS

* * *

12/8/2003	REPLY BRIEF OF APPELLANT. BY SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS (APPELLANT). SERVED BY MAIL ON 12/8/2003. FILED 12/8/2003. (NON-CONFIDENTIAL)
11/7/2003	BRIEF FOR PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. and JENNIE-O-FOODS, INC. BY UNITHERM FOOD SYSTEMS, INC. and JENNIE-O-FOODS, INC. (APPELLEES). SERVED BY MAIL ON 11/7/2003. FILED ON 11/7/2003. (NON-CONFIDENTIAL)
9/15/2003	BRIEF OF APPELLANT. BY SWIFT-ECKRICH, INC. (dba Conagra Refrigerated Foods) (APPELLANT). SERVED BY MAIL ON 9/15/2003. FILED ON 9/15/2003. (CONFIDENTIAL & NON-CONFIDENTIAL VERSIONS)

APPENDIX B— RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (OKLAHOMA CITY)

U.S. DISTRICT COURT
Western District of Oklahoma (Oklahoma City)

~~CIVIL~~ DOCKET FOR CASE #: 01-CV-347

Unitherm Food Sys, et al v. Swift-Eckrich Inc

Filed: 02/23/01
Assigned to: Honorable Robin J. Cauthron
Jury demand: Both
Demand: $75,000
Nature of Suit: 830
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:1338 Patent Infringement

UNITHERM FOOD SYSTEMS INC, an Illinois corporation	Greg A. Castro 405-232-9659 [COR LD NTC] Burck Bailey 405-232-9659 [COR LD NTC] Jay P. Walters 405-232-9659 [COR LD NTC] Fellers Snider Blankenship Bailey & Tippens-OKC 100 N Broadway Ave Suite 1700 Oklahoma City, OK 73102-8820 405-232-0621

Appendix B

	Dennis D. Brown 918-583-9659 [COR LD NTC] Fellers, Snider Blankenship Bailey & Tippens-OKC 321 S Boston Ave Suite 800 Tulsa, OK 74103-3318 918-599-0621
JENNIE-O FOODS INC., now known as Jennie-O Turkey Store, Inc., a Minnesota corporation plaintiff	Greg A Castro (See above) [COR LD NTC]

* * *

2/11/02	117	SEALED DOCUMENT: MOTION by defendant Swift-Eckrich Inc for summary judgment and brief in suppt (IN VAULT) (kew) [Entry date 02/12/02]

* * *

8/19/02	194	ORDER by Honorable Robin J. Cauthron; dft's mtn to strike is hereby denied; plas are granted partial sum jgm on their 3rd cause of action and their 6th and 7th affirmative defenses to dft's cntclm (Patent Invalidity and Unenforceability); plas are entitled to a jgm declaring the '027 patent invalid and unenforceable; dft is granted sum jgm on plas' 8th cause of

action (tortious interference with existing contractual and business relations); dft is also granted sum jgm on Jennie-O's antitrust claims; dft's mtn for sum jgm is denied on remaining causes of action, i.e. intentional interference with prospective economic relationships, actual or constructive fraud, violation of the Sherman Antitrust Act (Unitherm only); finally, this ruling moots the dft's mtn to strike Jennie-O's 2nd affirmative defense of non-infringement, or in the alternative, for partial sum jgm of infringement; a jgm will enter at the conclusion of these proceedings; [182-1]; [154-1], [147-1] [147-2] [117-1] (cc: all counsel) [EOD Date 8/19/02] (kew) [Entry date 08/19/02]

* * *

3/3/03 267 TRIAL briefs submitted by defendant Swift-Eckrich Inc (kew) [Entry date 03/04/03]

* * *

3/17/03 284 COURTROOM MINUTES: FURTHER JURY TRIAL; pla continues case in chief with testimony from David Howard, Russ Mangum and Jeffrey Kinrich; pla rests; dft's mtn for d.v. is denied; dft presents

case in chief with testimony from Chris Salm; ct adjourns to 9:30, 3/18/03 (kew) [Entry date 03/18/03]

* * *

3/19/03 287 COURTROOM MINUTES: FURTHER JURY TRIAL; dft continues case in chief with testimony from Alan G. Goedde, PhD; parties rest; dft renews mtn for d.v.; denied; closing arguments, court instructs the jury; bailiff sworn; jury retires to deliberate at 3:23; jury returns with verdict in favor of pla at 8:35 p.m.; jury is polled; jury is discharged; clerk to file judgment; cnsl granted additional 10 days to file post trial mtns; court exhibits 1 and 2 returned to pla cnsl; master exhibit list attached (kew) [Entry date 03/20/03]

* * *

3/19/03 292 VERDICT for plaintiff Unitherm Food Sys against defendant Swift-Eckrich Inc (kew) [Entry date 03/20/03]

* * *

3/19/03 295 SECOND STAGE VERDICT for plaintiff Unitherm Food Sys against defendant Swift-Eckrich Inc. (kew) [Entry date 03/20/03]

3/27/03	296	JUDGMENT IN A CIVIL CASE: by Honorable Robin J. Cauthron; terminating case (cc: all counsel) (kew) [Entry date 03/27/03]

* * *

4/9/03	298	STIPULATION for judgment on atty fees to plaintiffs in the sum of $1,022,445 (more fully set out) (kew) [Entry date 04/09/03]
4/9/03	299	JUDGMENT: by Honorable Robin J. Cauthron based upon the stipulation of the plaintiffs and dft and pursuant to USC 15 it is ordered adjudged and decreed that plas have and recover judgment against the dft in the amt of $1,022,445 as a reasonable atty fee [298-1] (cc: all counsel) (kew) [Entry date 04/09/03]

* * *

4/10/03	301	MOTION by defendant Swift-Eckrich Inc for remittur reducing damage award on antitrust count or, in the alternative, for new trial on antitrust damage (kew) [Entry date 04/11/03]
4/10/03	302	DECLARATION of Leigh O. Linder regarding motion for remittur reducing damage award on antitrust count [301-1],

regarding motion for new trial on antitrust damages [301-2] (kew) [Entry date 04/11/03]

* * *

4/23/03	304	MOTION by defendant Swift-Eckrich Inc to amend judgment entered on 4/9/03 and to set amount of supersedeas bond (kew) [Entry date 04/23/03]
4/28/03	305	RESPONSE by plaintiff Unitherm Food sys, plaintiff Jennie-O Foods Inc to motion for remittur reducing damage award on antitrust count [301-1], motion for new trial on antitrust damages [301-2] (kew) [Entry date 04/28/03]
5/7/03	308	REPLY by defendant Swift-Eckrich Inc to response to motion for remittur reducing damage award on antitrust count [301-1], motion for new trial on antitrust damages [301-1] (kew) [Entry date 05/08/03]
5/12/03	309	BRIEF IN OPPOSITION by plaintiff Unitherm Food Sys, plaintiff Jennie-O Foods Inc to motion to amend judgment entered on 4/9/03 and to set amount of supersedeas bond [304-1] (kew) [Entry date 05/13/03]

Appendix B

5/23/03	310	ORDER by Honorable Robin J. Cauthron granting in part and denying in part dft's motion to amend judgment entered on 4/9/03 and to set amount of supersedeas bond [304-1]; dft's req to amend the jgm is denied; the Ct sets the amt of the supersedeas bond at $19,022,445.00 (cc: all counsel) [EOD Date 5/23/03] (kew) [Entry date 05/23/03]
6/4/03	311	ORDER by Honorable Robin J. Cauthron; in the absence of any evidence demonstrating the verdict is the result of a manifest error of law, and considering that the jury's verdice can be reconciled with the evidence and the instructions, the Ct finds that Dft's motion for remittur reducing damage award on antitrust count [301-1], or, in the alternative, motion for new trial on antitrust damages [301-2] should be and is denied (cc: all counsel) [EOD Date 6/4/03] (kew) [Entry date 06/04/03

* * * *

APPENDIX C — DEFENDANT'S MOTION FOR DIRECTED VERDICT DATED MARCH 17, 2003 AND RENEWED MOTION FOR DIRECTED VERDICT DATED MARCH 19, 2003 (R. A5231-5238, 5884-5885)

[Commencing at page 1100]

* * *

MR. BAILEY: Plaintiffs rest, Your Honor.

THE COURT: Counsel, come to the bench.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF THE HEARING OF THE JURY:)

MR. SCHROEDER: Do I have the floor?

THE COURT: Yes, you do.

MR. SCHROEDER: Your Honor, I would like to make a motion for directed verdict at this point with respect to each of the plaintiffs' claims. Would the Court like to hear anything further about that at this time?

THE COURT: No, not unless you think you've got something that you think will persuade me.

MR. SCHROEDER: Well, I do, yes.

THE COURT: On each one of the three?

MR. SCHROEDER: Well, certainly, most definitely on the fraud claim that I would like to argue the others as well.

[1101] THE COURT: Okay. I'll let the jury go on their break and we'll have a five-minutes or less of argument.

MR. SCHROEDER: If the Court tells me how much time, I'll stay within it.

THE COURT: All right.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Members of the jury, I'm going to send you on your break. It will be a little longer this time because we have some things to take care of at this point in the trial. I will instruct you not to discuss the case among yourselves or with anyone else. Please be back in the jury assembly room at 15 till. We'll call for you at that time.

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: Mr. Schroeder.

MR. SCHROEDER: Your Honor, the defense moves for a directed verdict with respect to each of the causes of action. And primarily I'd like to discuss, within the limited time available at this point, the fraud cause of action, and I urge that that be dismissed because Your Honor may recall that we earlier moved for a summary judgment as to that claim and the plaintiff opposed that motion on the basis that there was a fraud in the sense of a promise to consider the oven, the purchase of the oven, which had not been fulfilled, and therein [1102] lied the heart of the fraud. I think it would follow from that that the plaintiff did not make its claim until 2001, even though this fraud supposedly first occurred in 1995 or '6 because it was only when the patent issued that they were able to see the motivation of the plaintiff. So it was in that way that they kind of dodged a bullet and avoided summary judgment and I think they subsequently are estopped from asserting some other fraud. I think it's also pertinent here that fraud must be pleaded with particularity.

Pursuant to the plaintiffs' position, and with the plaintiffs' acquiescence, an instruction was given to the jury at the beginning of this case that was consistent with the plaintiffs' position on fraud. The plaintiff then waited until the principal witness in this regard, Arni Mickelberg, had left the jurisdiction and then changed its fraud claim and then asserted that instead of the fraud being based on a breach of contract to consider the purchase of the oven, the plaintiff asserted that there was a different agreement, that ConAgra would in fact buy the oven if certain criteria were met.

Now, it seems to me that they can't change their fraud claim that way after the witness is gone. And they can't

change their fraud claim to one which is different from the fraud claim that they asserted to escape from summary judgment earlier in the case.

And another problem here is that if they are to be allowed [1103] to amend their fraud claim, to assert a different fraud claim, then the defendant must be allowed to assert the defense of the statute of limitations, and the change in the plaintiffs' fraud claim does give rise to a statute of limitations defense, and this is the reason: They could have argued that if the fraud had been as they originally contended, a promise made to consider the purchase of an oven, then there would be some logic, I suppose, on the basis of which that the jury could conclude that it was only when the patent issued that they realized that the subjective judgment not to buy the oven was made not in good faith. But if they change that and say there was an obligation to buy the oven, well, then they knew in 1996 that the oven had not been purchased, they didn't have to wait for the patent to issue and they should have made their claim then but instead they made it in 2001 and the two-year statute of limitations had long since passed. So, for all of those reasons, I don't think that this fraud claim can stand.

I would also point out that we can, if we have more time, show the Court that Mr. Mickelberg flatly denied that there was any commitment to buy the oven under any circumstances.

THE COURT: Let me stop you here --

MR. SCHROEDER: Sure.

THE COURT: -- and ask Mr. Castro or Mr. Bailey, what is your fraud claim?

- MR. CASTRO: Well, Your Honor, it's an ongoing fraud [1104] from 1993 on up through 2000, 2001 when Mr. Howard knew and learned about the entire patent and the entire conduct of Swift-Eckrich in taking his ideas and learning about his process and how everything worked and filing a patent on it and then sending letters out to the market to destroy his business. Your Honor, the fraud is throughout this time period.

THE COURT: You can't have it throughout. You have to have pled and gotten past summary judgment on a claim for fraud.

MR. CASTRO: And we did plead, Your Honor, the very claim that we've alleged, and they have never raised the statute of limitations. It's not in their answer, it's not in the pretrial order, and I think we've been consistent in our contention of when that fraud occurred.

THE COURT: Do you persist in the contention that the fraud you claim can be defined as the defendant's considering purchase of the equipment during that '95/'96 demonstration period with no intent to ever purchase the equipment?

MR. CASTRO: Yes.

THE COURT: Is that what you contend the fraud is?

MR. CASTRO: Yes.

THE COURT: Regardless of what the proof may have been at this trial?

MR. CASTRO: Yes.

THE COURT: I think you're limited to that. That's [1105] what's been pled and that's what's been argued. I am willing to include something in the fraud instruction that limits the fraud that the jury can find. They can't just find that defendant did you wrong. It has to be tied to what's been pled in this case.

I understand that won't satisfy you completely, Mr. Schroeder, but I think there is evidence of the fraud that's been pled and discussed throughout this case. There is evidence of other bad acts that I suspect the plaintiff in closing argument will attempt to persuade the jury is fraud, and that's what my instruction will be designed to prevent.

MR. SCHROEDER: Your Honor, my view of that is that to prove fraud the plaintiff must prove a false statement to Unitherm on which Unitherm relied. Now, they might prove other things in addition to that but they have to have that. If they don't have that, the elements of fraud are not present.

Now, Mr. Castro is saying the fraud was pretending that they would buy the oven -- that they would consider the purchase of the oven, but when Mr. Howard was on the witness stand, he conceded that ConAgra did consider the purchase of the oven. He didn't dispute that. That, of course, was the testimony of Mr. Mickelberg. There's no other witness on the subject. So --

THE COURT: I think when viewed in the light most favorable to the plaintiff, there is evidence from which the [1106] jury could conclude that the fraud pled did occur, and I will overrule your motion subject to the giving of a limited instruction as I have described.

MR. SCHROEDER: Your Honor, may I just very briefly mens the other basis for the motion?

THE COURT: Yes.

MR. SCHROEDER: That is, the other two causes of action are both dependent upon the plaintiff proving by clear and convincing evidence that there was an intent to deceive the patent office. Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

THE COURT: Again, viewing the evidence in the light most favorable to the plaintiff, I think there is such evidence and I will overrule your motion on those grounds as well.

MR. SCHROEDER: Finally, Your Honor, I would again like to raise the Crystal Gas problem, that I do not believe they have put in sufficient evidence to permit an award of damages with respect to intentional interference with prospective economic advantage or they haven't proven specific customers and specific orders as required by that case.

Appendix C

THE COURT: And I believe they have, and I'm also satisfied they have shown sufficient evidence that sister or subsidiary companies were interfered with and that their [1107] relations can be used to determine that cause of action as well as companies foreign to the defendant or not connected to the defendant.

MR. SCHROEDER: Thank you, Your Honor.

* * *

[1461]

* * *

MR. SCHROEDER: Yes, Your Honor, if I may. For the record, Your Honor, I would like to make a motion on behalf of the defendant for directed verdict for each of the three causes of action that the plaintiffs have brought. Would the Court like to hear further on that point now?

THE COURT: Is it on the same basis you argued earlier?

MR. SCHROEDER: Essentially, Yes, Your Honor.

THE COURT: I will overrule those motions for the same reasons I gave earlier.

* * *

APPENDIX D — JURY VERDICT FILED MARCH 19, 2003 (R. A0096-0097)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota Corporation,

Plaintiffs

vs.

SWIFT-EKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant

Verdict Form

We the jury, being duly sworn upon our oaths, find as follows:

I. On the claim of attempted monopolization:

X For Plaintiff Unitherm Food Systems Inc.

—OR—

__ For Defendant Swift-Ekrich, Inc., d/b/a/ Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $6,000,000.

Appendix D

II. On the claim of intentional interference with prospective business advantage:

X For Plaintiff Unitherm Food Systems Inc.

—OR—

__ For Defendant Swift-Eckrich, Inc., d/b/a Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $2,000,000.

III. On the claim of fraud on Unitherm:

__ For Plaintiff Unitherm Food Systems Inc.

—OR—

X For Defendant Swift-Ekrich, Inc., d/b/a Conagra Refrigerated Foods.

If you found for Plaintiff, what is the dollar amount of Plaintiff's damages $_____.

If you found for Plaintiff on its claim for intentional interference or its claim for fraud, please answer the following:

We do X do not __ (Check One) find by clear and convincing evidence that Defendant, acted in reckless disregard of the rights of others.

Appendix D

—OR—

We do __ do not __ (Check One) find by clear and convincing evidence that Defendant, acted in intentionally and with malice towards others.

March 19, 2003
Date

s/ Louis Furmanski
Presiding Juror

APPENDIX E — JURY VERDICT – SECOND STAGE FILED MARCH 19, 2003 (R. A6475)

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota Corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC., d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

Verdict Form – Second Stage

We the jury, being duly sworn upon our oaths, find in favor of Plaintiff, Unitherm Food Systems, Inc., and fix the dollar amount of punitive damages in the sum of $2,000,000.

March 19, 2003
Date

s/ Louis Furmanski
Presiding Juror

APPENDIX F — JUDGMENT FILED MARCH 27, 2003 (R. A0001-0004)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

JUDGMENT

This action came on for trial before the court and a jury, Honorable Robin J. Cauthron, Chief Judge of the United States District Court, presiding. The issues having been duly tried and the jury has duly rendered its verdict. In accordance with the jury's March 19, 2003 verdict,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Unitherm Food Systems, Inc. ("Plaintiff") shall have

Appendix F

and recover on its claims against Defendant Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Foods ("Defendant"), as follows:

On Plaintiff's claim for attempted monopolization in violation of § 2 of the Sherman Act, trebled pursuant to 15 U.S.C. § 15, the sum of Eighteen Million and No/100 Dollars ($18,000,000.00);

On Plaintiff's claim for tortious interference with prospective economic advantage, the sum of Two Million and No/100 Dollars ($2,000,000.00);

On Plaintiff's claim for exemplary damages the sum of Two Million and No/100 Dollars ($2,000,000.00);

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff shall have and recover judgment against the Defendant in the amount of Eighteen Million and No/100 Dollars ($18,000,000.00) and post-judgment interest thereon at the rate provided by law, a reasonable attorney fee and the costs of this action.

Entered this 27th day of March, 2003.

s/ Robin J. Cauthron
Robin J. Cauthron
United States Chief District Judge

Appendix F

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APPENDIX G — STIPULATION FOR JUDGMENT ON ATTORNEY FEES TO PLAINTIFFS FILED APRIL 9, 2003 (R. A0005)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC. a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

STIPULATION FOR JUDGMENT ON ATTORNEY FEES TO PLAINTIFFS

Plaintiffs and Defendant hereby stipulate and agree that judgment in the sum of $1,022,445 may be entered in favor of Plaintiffs and against Defendant as a reasonable attorney fee pursuant to 15 U.S.C. § 15. This Stipulation is without prejudice to the issue of whether or not Plaintiffs are entitled to an attorney fee award in the event the United States Courts of Appeals for the Federal Circuit reverses, modifies or remands the judgment of March 27, 2003.

Appendix G

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APPENDIX H — JUDGMENT FOR ATTORNEY FEE FILED APRIL 9, 2003 (R. A0005.1)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CI V-01-347-C

UNITHERM FOOD SYSTEMS, INC., an Illinois corporation; and JENNIE-O FOODS, INC., a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC., d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

JUDGMENT

Based upon the Stipulation of the Plaintiffs and Defendant, and pursuant to U.S.C. § 15, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover judgment against the Defendant in the amount of $1,022,445 as a reasonable attorney fee.

Entered this 9 day of April 2003.

s/ Robin J. Cauthron
Robin J. Cauthron
United States District Judge

APPENDIX I — DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES FILED APRIL 10, 2003 (R. A6429-6443)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendants.

DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES

Appendix I

[Table of Contents and Authorities Intentionally Omitted]

Pursuant to Fed.R.Civ.P. 59(e), Defendant Swift-Eckrich, Inc. ("Swift-Eckrich") respectfully requests that the Court order a remittitur reducing the antitrust damages award from $18 million to $6 million and amend the judgment accordingly. A proposed amended judgment is lodged concurrently with this motion. If Plaintiff Unitherm Food Systems, Inc. ("Unitherm") refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages pursuant to Fed.R.Civ.P. 59(a).

The grounds for the motion are that the jury found that the actual damages to Plaintiff Unitherm with respect to the claim for intentional interference with prospective economic advantage were $2 million. Based on the identical evidence and arguments, which made no distinction between the two causes of action, the same jury found that the antitrust damages were $6 million. Obviously, the jury has trebled the damages. They should not be trebled again.

Appendix 1

BRIEF IN SUPPORT OF DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL ON ANTITRUST DAMAGES

I. INTRODUCTION

Unitherm's claims for intentional interference and antitrust violations were both premised on contentions that Swift-Eckrich obtained the '027 patent through fraud on the Patent & Trademark Office, and that by asserting the patent, Swift-Eckrich caused Unitherm to lose profits on the sale of its browning equipment. Accordingly, the same evidence and even the same argument before the jury supported Unitherm's claim for damages under the respective legal theories. Unitherm did not offer any evidentiary basis for concluding that the compensatory damages under one theory were different from those under the other. Thus, Unitherm's lost profits are Unitherm's lost profits, regardless of the underlying theory as to why Defendant's conduct was unlawful.

The jury, however, awarded ***$2 million*** as compensatory damages on the intentional interference claim, but awarded exactly three times as much, ***$6 million***, on the antitrust claim It is, therefore, clear that the jury improperly trebled the antitrust damages before submitting its verdict to the Court. ($2 million x 3 = $6 million.) Because the Court then trebled that amount again[1] ($6 million x 3 = $18 million), the

[1] Title 15, U.S.C. § 15 provides, in pertinent part, that "any person who shall be injured in his business or property by reason of (Cont'd)

Appendix 1

judgment is excessive and should not stand. The Court should, therefore, order a remittitur and reduce the judgment amount accordingly. If Unitherm is unwilling to accept a remittitur, a new trial should be granted on the issue of the amount of antitrust damages to resolve the inconsistency between the antitrust and intentional interference awards.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Unitherm's Evidence In Support Of Its Purported Antitrust And Intentional Interference Damages.

At trial, Unitherm relied almost exclusively on an expert witness, Jeffrey Kinrich, to prove damages in the form of lost profits. (That testimony is attached as Exh. 1.) He testified as to the profits that Unitherm would have made on additional browning equipment sales from 1998 forward but for Swift-Eckrich's conduct. (Exh. 1.) Mr. Kinrich did not calculate antitrust damages separately from intentional interference damages. He simply relied upon an assumption that the acts of Swift-Eckrich caused a decline in Unitherm's sales and resulting loss of profits without assigning any legal theory as to why those acts were wrong. (Exh. 1, R.T. 4:13-10:21.) Indeed, he used a single set of demonstrative charts to show Unitherm's sales trends and his projections of lost profits on browning lines from 1998 forward. He offered only one analysis that applied to both claims.

(Cont'd)
anything forbidden in the antitrust laws . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . . ."

Q. Were you able to come up with a damage analysis of how you believe, if at all, Unitherm **suffered damage as a result of the conduct of ConAgra**?

A. Yes.

(Exh. 1 RT., 8:13-25.)

Q. To come up with lost profits, Mr. Kinrich, what did you do – what did your analysis consist of in this case?

A. Well, in doing lost profits as a measure of damages, the basic concept is to start with what you know, start with what actually happened and if you look at this chart that's in front of you that's the second line which says "Actual Browning Line Sales."

So first I went to find out what actually happened. Then I want to figure out what would have happened if there had not been the acts at issue, . . . if Swift Eckrich had not attempted to keep Unitherm from selling the browning lines. So I did a projection and we'll talk about that.

Obviously, if you look at the chart, projected minus actual is the amount of lost sales, but lost sales are not lost profits and damages, are not equal to sales, they're equal to profits. **So I then had to figure out what profits Unitherm would**

make on those additional lost sales and that's what I call the incremental profit margin, which is a percentage, and we'll talk a little bit about how I did that later.

(Exh. 1, R.T., 8:13-25, emphasis added.)

On cross-examination, Mr. Kinrich confirmed that his singular damage analysis was based on an assumption that ". . . the jury will find something to be – result in liability . . ." (Exh. 1, R.T. 24:25-25:25) He thus offered an opinion only as to the "financial impacts" of Swift-Eckrich's conduct, assuming that conduct to have been wrongful by some undefined legal standard.

None of Unitherm's other witnesses even suggested that Unitherm suffered different or greater lost profits from antitrust violations as compared to acts of intentional interference. Not one shred of evidence was offered that would enable the jury to reach different damage conclusions as to the two claims.

Indeed, Swift-Eckrich objected to this presentation of the same damage evidence as to Unitherm's two claims, arguing that the intentional interference claim, unlike the antitrust claim, required proof of damage on a customer by customer and order-by-order basis. Unitherm did not, however, present any such evidence that was identified as being specific to the intentional interference claim.

B. The Court's Instructions On Damages.

The jury was instructed that if Swift-Eckrich were found liable for intentional interference, Plaintiff could recover "any damages that are a natural and probable consequence of that interference. These damages are measured by the amount of money that will compensate Plaintiff for the loss of the economic relationship." (Exh. 3.) Further, if Swift-Eckrich were found liable for antitrust violations, the Plaintiff should "be fairly compensated for all damages, if any, to Plaintiffs business or property that were primarily caused by the conduct of Plaintiff." These damages "***should include any damages suffered by Plaintiff because of lost profits***; that is to say, profits that Plaintiff would have made, but for the unlawful conduct of Defendant." (Exh. 4, emphasis added.) These instructions, especially when viewed in the light of the evidence in this case, provide no basis for differing damage awards. Lost profits is the measure in both instances.

As to trebling, Swift-Eckrich requested an instruction that the jury limit its award to ***actual damages*** suffered by Unitherm for antitrust violations, and that it should not concern itself with the final judgment amount:

> If you find for Unitherm in accordance with these instructions, it then becomes your responsibility to determine the actual damages that Unitherm has suffered by reason of the violations of the antitrust laws. Your concern is only with determining the actual damages. You are not to concern yourself with the judgment to be entered by the Court in this case.

(Exh. 2.[2]) The Court declined to give this instruction.

C. The Verdict Form.

Counsel for the parties met at length with the Court and with one another regarding the verdict form. By stipulation, the parties agreed that damages for antitrust violations and intentional interference would be duplicative, as both sought Unitherm's lost profit for browning equipment sales that were not made from 1998 forward. The parties thus stipulated that if the jury were to find liability under both theories, Unitherm would be entitled to an award of damages on only one of the theories. (Linder Decl. ¶ 9.)

D. Argument Of Counsel.

In arguing the case to the jury, neither side suggested that different damage awards were appropriate for the intentional interference and antitrust causes of action.

E. The Verdict.

The jury found liability on both the antitrust and intentional interference claims. (Exh. 4.) It found that the

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[2] *See* 3 O'Malley, et al., Federal Jury Practice & instructions § 150.93 (2001). In accordance with Tenth Circuit law, the instruction did not mention the trebling of the award. *Semke v. Enid Auto. Dealer's Assn*, 456 F.2d 1361, 1370 (10th Cir. 1972) (jury should not be told about the trebling of damage award).

compensatory damages on the intentional interference count were $2 million, but awarded $6 million on the antitrust count. The obvious conclusion is that the jury found the compensatory damages to be $2 million (to which it later added another $2 million in punitive damages) and trebled the compensatory damages to award $6 million on the antitrust claim. Indeed, it would be unrealistic to pretend that the jury did not know that antitrust damages are to be trebled. The foreman of the jury was the chairman of a university Political Science department.

III. THE $18 MILLION AWARD RESULTED FROM A MANIFEST ERROR OF LAW AND SHOULD BE REDUCED.

A. The Court Has The Power To Correct A Manifest Error.

A judgment may be altered or amended pursuant to a motion under Fed. R. Civ. P. 59(e)[3] when it is "necessary to correct manifest errors of law." *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996), citing Wright, et al., *Federal Practice and Procedure: Civil 2d*, § 2810.1, at 124-25 (1995).

A jury's award of damages that is not allowed by law or is not supported by the evidence constitutes such a manifest error of law. *See Guides, Ltd. v Yarmouth Group Property Mgt., Inc.*, 295 F.3d 1065, 1076-77 (10th Cir. 2002) (evidence

[3] Fed. R Civ. P. 59 (e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

did not support award of damages above plaintiff's lost profits; thus, jury's damage award was reduced from $150,000 to no more than $75,000); *see, Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167, 1178 (10th Cir. 1981) (affirming reduction of an "excessive" punitive damages award from $3 million to $1 million). In *Brown v. Presbyterian Healthcare Servs.*, the jury awarded $187,000 to plaintiff on her antitrust claim ($112,000 in compensatory damages and $75,000 in punitive damages). After entry of judgment, the district court granted defendant's motion under Fed. R Civ. P. 59(e) to vacate the award of punitive damages, and entered an amended judgment reducing the award to $112,000. The Tenth Circuit affirmed, reasoning that punitive damages were not allowed by the statute and would duplicate the enhancement already provided in the trebling provision. Thus, "the district court's decision to vacate the award of punitive damages served to correct a manifest error of law and did not prejudice [the plaintiff.]" *Id.* at 1332. Where a reduction of a jury verdict is appropriate, the court may order a remittitur to eliminate any improper award from the judgment. *Malandris v. Merrill Lynch*, 703 F.2d at 1178 (remittitur is a "widely accepted remedy").

B. The Antitrust Award Contains A Manifest Error Of Law Because The Jury Improperly Trebled The Amount Of Antitrust Damages.

Where a plaintiff tries its a case based upon a single set of facts demonstrating a single injury for which the jury could find liability under alternative theories, "lopsided" or inconsistent damages awards have been found to demonstrate

that the jury calculated the award by improper means or by misapplying the law. For example, in *Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1085 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989), all of plaintiffs claims (for civil rights violations, contractual interference, and antitrust violations) were premised upon the same evidence that its business was harmed by defendant-city's application of zoning laws. The jury found defendant liable on all three theories but awarded damages as follows:

Civil Rights:

Compensatory	$200,000
Punitive	$2.5 million

Contractual Interference:

Compensatory	$1.245 million
Punitive	$500,000

Antitrust: $0

The trial court granted JMOL on the civil rights and intentional interference claims, leaving only the antitrust claim. On appeal, plaintiff argued that it was entitled to a new trial on the issue of antitrust damages. The Fifth Circuit Court of Appeals agreed and remanded, reasoning that the plaintiff

> tried this case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. . . . ***The case was not presented, tried, or argued as one in which discrete damages had been suffered under, each claim. Although liability arguments under each theory may have been advanced on different parts of the evidence, it seems dear that damages under each theory rested on identical facts, that is the loss of business and customers*** because of the [defendant's] application of its zoning laws as reflected by [plaintiff's] loss in revenues and value between the first and second contracts of sale [of assets to a third party].

Id. at 1085-86, emphasis added. "Thus, ***one would expect the jury's respective damages awards to be virtually the same"*** *Id.* at 1086, emphasis added. In the Court's view, the "lopsided verdict" persuaded the Court that the jury had improperly set the awards by "decid[ing] the total amount it wished to award and apportion[ing] it among the theories, rather than awarding duplicative damages on each separate theory in approximately the same amount." *Id.* at 1085. Because the Court could not determine why the jury awarded "***zero damages*** for antitrust violations and a ***major sum*** for contract interference ***when both theories are supported by the same set of facts***," it found that the plaintiff should have another chance to prove up its antitrust damages. *Id.* at 1086, emphasis added; *see also, Rosario v. Livaditis*, 963 F.2d 1013, 1020-21 (7th Cir. 1993), *cert. denied* 506 U.S. 1051 (1993) (where plaintiff's case was premised on a single set of facts, it was "conspicuously inconsistent" for jury to award

$600,000 for violation of the Consumer Fraud Act and zero damages for violation of RICO; new trial on damages was warranted).

In this case, as in *Video Int'l Production* and *Rosario,* Unitherm clearly proceeded on the basis that the measures of compensatory damages for antitrust violations and intentional interference were one and the same. Indeed, Unitherm's vigorous opposition to efforts by Swift-Eckrich to preclude Unitherm from relying on generalized evidence of lost sales (e.g., evidence of sales trends, as opposed to an individualized evidence of lost customers) as the basis of its intentional interference damages eliminated any difference that might have existed.[4]

None of Unitherm's other witnesses – economist Jeffrey Kinrich, executive David Howard, sales representative Ron Snider, or antitrust expert Russell Mangum – gave any testimony, nor did Unitherm offer a single document that would support a finding that Unitherm's antitrust damages were different from, much less three times the damages caused by intentional interference. In short, Plaintiffs did not provide the jury with any reason to award $4 million over and above the lost profits that it had determined to be $2 million. (Linder Decl., ¶ 3.)

[4] Swift-Eckrich made a motion in limine to preclude Unitherm from "relying on generalized evidence of lost sales based on past or present sales levels, future sales projections, or industry trends" to prove intentional interference with prospective economic advantage. Swift-Eckrich also submitted jury instructions that instructed the jury that generalized evidence was insufficient to establish the tort. The Court denied the motion in limine and declined to give the jury instruction. (Linder Decl., ¶¶ 6-7.)

The only plausible explanation for an award of antitrust damages that is exactly three times the award of intentional interference damages is that the jury incorrectly believed that it was permitted to (or supposed to) return a verdict of treble damages. This, of course, was incorrect. *See Semke v. Enid Auto. Dealers Assn.*, 456 F.2d at 1370 ("in an antitrust case, it is not for the jury to fix the amount of the judgment. Its function is completed once it determines the amount of damages"). The jurys error, which is now embodied in the $18 million judgment, cannot be allowed to stand. The correct amount of the award on the antitrust claim should be $6 million ($2 million x 3 = $6 million), and the Court should order a remittitur and reduce the judgment accordingly. Even more so than in the cases discussed above, the $4 million discrepancy in the jurys verdict here shows a compelling need for a remittitur or a new trial on damages. *Compare, Video Int'l Productions,* 858 F.2d at 1085 ($1.245 million discrepancy warranted new trial); *Rosario v. Livdditis,* 963 F.2d at 1020-21 ($600,000 discrepancy warranted new trial).

IV. IF UNITHERM WILL NOT ACCEPT A REMITTITUR, THEN A NEW TRIAL SHOULD BE ORDERED ON THE ISSUE OF ANTITRUST DAMAGES.

If the Plaintiff does not accept the remittitur, the Court may order a new trial on damages pursuant to Fed. R. Civ. P. 59(a).[5] *Holmes v. Wack,* 464 F.2d 86, 89 (10th Cir. 1972)

[5] Fed. R. Civ. P. 59 (a) provides, in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . ."

("where the court believes the judgment for damages is excessive, that is, it is against the weight of the evidence, the court may order a remittitur and alternatively direct that there be a new trial if the plaintiff refuses to accept it"); *Malandris v. Merrill Lynch,* 703 F.2d at 1178 (if plaintiff were unwilling to accept remittitur reducing damages award, then new trial should be ordered); *Video Int'l Production, Inc.,* 858 F.2d at 1086 (new trial on damages necessary to resolve "the confusing conflict among the various awards".

If Unitherm will not accept a reduction of the judgment to bring the award into compliance with the antitrust laws, the Court should order a new trial to resolve the discrepancy between the $2 million intentional interference award and the $6 million antitrust award, both of which were based on exactly the same evidence.

V. CONCLUSION

To prevent a manifest miscarriage of justice, the Court is respectfully requested to issue a remittitur reducing the amount of antitrust damages from $18 million to $6 million and enter the [Proposed] Amended Judgment filed concurrently herewith.[6] If Unitherm refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages.

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[6] As indicated in the [Proposed] Amended Judgment, Swift-Eckrich also requests that the form of judgment indicate that Unitherm did not prove its fraud claim, and therefore, recovers nothing on that claim.

Dated: April 8, 2003

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APPENDIX J — DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED APRIL 23, 2003 (R. A6444-6457)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND

Appendix J

Pursuant to Fed.R.Civ.P. 59(e), Defendant Swift-Eckrich, Inc. ("Swift-Echrich") respectfully requests that the Court amend the Judgment entered on April 9, 2003 ("Attorney Fee Judgment") by combining it with the earlier judgment entered on March 27, 2003 ("Merits Judgment"); thereby creating a single amended judgment reflecting both the final damages award and the attorney fee award. The interests of judicial economy and convenience will be served by entering a single amended judgment because the case can then proceed to the Federal Circuit as a single appeal.

Plaintiff, Unitherm Food Systems, Inc. ("Plaintiff") will suffer no prejudice if the requested amended judgment is entered. Defendant proposes to post a supersedeas bond in the amount of the damages award plus $1,022,445.00 (the amount of the stipulated attorney fee award). This amount will adequately protect Plaintiffs interests in the collectability of the Judgments. Pursuant to Fed.R.Civ.P. 62(d) and-LCvR 62.2(b), Defendant requests that the Court approve this amount as the bond amount.

I. THE COURT SHOULD ENTER A SINGLE AMENDED JUDGMENT REFLECTING THE DAMAGES AWARD AND THE ATTORNEY FEE AWARD.

On March 27, 2003, the Court entered judgment on the jury's verdict (Exh. 1.) This Merits Judgment provides for Plaintiffs recovery of $18 million as damages on the claim for attempted monopolization, but is the subject of a post-trial motion under Rule 59(e) filed by Defendant on April 10, 2003. Because Plaintiff's opposition to that motion is not due until April 28, a ruling is not expected at this time.

The antitrust statutes provide that a prevailing plaintiff shall recover a reasonable attorney fee. 15 U.S.C. §15. On April 7, 2003, the parties stipulated to the ***amount*** of the fee award that Plaintiff would recover. (Defendant, however, disputes Plaintiffs ***entitlement*** to its fees, which was awarded based solely upon its status as the prevailing party on a fatally flawed federal antitrust claim). On April 9, 2003, the Court entered a separate judgment awarding Plaintiff $1,022,445 as a reasonable attorney fee ("Attorney Fee Judgment"). (Exh. 2.)

Defendant intends to file notices of appeal *from* both Judgments.[1] The deadline for filing a notice of appeal from

[1] Appeal from an attorney fee award must be taken separately from any appeal from a judgment on the merits of the underlying case. Otherwise, the appellate court has no jurisdiction as to the fee award. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1160 (9th Cir. 1999) (notwithstanding reversal of judgment on merits, appellate court (Cont'd)

the Attorney Fee Judgment is May 9, 2003. *See* Fed.R.App.P. 4(a)(1)(A) (30 days from entry of judgment). However, the deadline *for* filing a notice of appeal from the Merits Judgment is expected sometime later due to the pending post-trial motion. *See* Fed.R.App.P. 4(a)(4)(A)(iv) (notice of appeal to be filed within 30 days after order disposing of last post-trial motion).

Because the Merits Judgment and the Attorney Fee Judgment are intertwined and interdependent, the interests of judicial economy would be served if the matters were heard in a single appeal. However, because of the timing of entry of the respective judgments, Defendant is now in the untenable position of having to commence an appeal on the Attorney Fee Judgment before the Merits Judgment is ripe for appeal. Entry of a single amended judgment reflecting the damages award **and** the attorney fee award would allow the parties to pursue a single appeal as to all issues in this case.

II. GOOD CAUSE EXISTS FOR THE COURT TO ENTER A SINGLE AMENDED JUDGMENT.

A judgment may be altered or amended on motion of a party pursuant to Fed. R. Civ. P. 59(e). The Federal Rules of Civil Procedure no longer require entry of a "separate"

(Cont'd)
lacked jurisdiction to reverse fee award because no timely notice of appeal had been filed as to fee award); *California Med. Ass'n v. Shalala, 207* F.3d 575, 576 (9th Cir. 2000) (same); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998).

judgment for attorney fees. Effective December 1, 2002, Rule 58(a)(1) was amended to provide that "[e]very judgment and amended judgment must be set forth on a separate document, ***but a separate document is not required for an order disposing*** of ***a motion: . . . (C) for attorney fees under Rule 54*** . . . ." (Emphasis added to language added by amendment.)

Here, entry of a single amended judgment will eliminate the need for Defendant to file two separate appeals and later move to consolidate those proceedings. *See* Fed.R.App.P. 42(a). Combining the judgments also would allow Defendant to post a single supersedeas bond (thereby avoiding administrative costs associated with posting two separate bonds) and would ensure that execution on Attorney Fee Judgment is stayed pending the post-trial motion briefing and the filing of a notice of appeal on the Merits Judgment. Most significantly, Defendant will not be left in the untenable position of having to prosecute an appeal for the Attorney Fee Judgment while the District Court still has jurisdiction over the merits of the underlying case including the very cause of action that gave rise to the fee award in the first place.

Plaintiff will suffer no prejudice if a single amended judgment is entered. Defendant proposes the posting of a supersedeas bond pursuant to Fed.R.Civ.P. 62(d) and LCvR 62.2(b)[2] based on the combined total of the two Judgments.

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[2] LCvR 622(b) indicates that the amount. of the .bond maybe set upon motion to the Court. That section provides: "On its own motion, or ***upon the motion of a party*** in interest, the Court may at any time order any party to give security, bond or undertaking in such amount as the Court may order for the payment of costs or for performance of other conditions or requirements imposed in an action or proceeding." (Emphasis added.) (Cont'd)

Thus, Plaintiff's interest in preserving a fund to cover the amount of the combined Judgments will be protected.

III. IF A SUPERSEDEAS BOND IS ORDERED AS A CONDITION TO STAY, THE PRINCIPAL AMOUNT OF THE BOND SHOULD NOT EXCEED THE AMOUNT OF THE DAMAGES AWARD PLUS FEES.

Defendant Swift-Eckrich is a wholly-owned subsidiary of Conagra Foods, a publicly traded company that had $27.6 million in sales for 2002. There is no legitimate basis for suggesting that Plaintiffs' judgment would be uncollectable if Defendant's appeal proves to be unsuccessful. If the Court is inclined to order a supersedeas bond at all, the principal amount of the bond should not exceed the combined total of the damages award and the fee award and need not require additional amounts to cover interest accruing during the appeal. If Defendant's Remittitur Motion is granted, the principal amount of the supersedeas bond staying execution of both Judgments (or the single amended judgment requested in this motion) should not exceed $7,022,445 ($6 million + $1,022,445 = $7,022,445). If the Motion is not granted the amount of the bond should not exceed $19,022,445 ($18,000,000 + $1,022,445= 519,022,445).

(Cont'd)

Fed.R.Civ.P. 62(d) provides: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal . . . . The stay is effective when the supersedeas bond is approved by the court."

IV. CONCLUSION.

For all of the reasons stated above, the Court should enter single amended judgment reflecting both the final damages award and the attorney fee award. Further, the principal amount of any supersedeas bond required of Defendant should not exceed the combined total of the damages award and the fee award.

Dated: April 21 2003

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APPENDIX K — PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL REGARDING ANTITRUST DAMAGES FILED APRIL 28, 2003 (R. A6458-6495)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL REGARDING ANTITRUST DAMAGES

Appendix K

Plaintiffs hereby respond to "Defendant Swift-Eckrich's Motion For Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages" (the "Motion") and state as follows:

SUMMARY OF THE ARGUMENT

Buried within Swift-Eckrich's Motion is the following statement which is necessary to the Motion's success: "Indeed, it would be unrealistic to pretend that the jury did not know that antitrust damages are to be trebled. The foreman of the jury was the chairman of a university Political Science department." (Defendant's Motion p. 6). In other words, notwithstanding the high standard governing Swift-Eckrich's Motion and notwithstanding the fact that not a word was spoken to the jury during the trial by the Judge, counsel, parties or witnesses regarding trebling damages, Swift-Eckrich is asking this Court to assume the jury violated the instructions and trebled the damages. And for this result, Swift-Eckrich cites a declaration of its own attorney. The Motion is truly absurd and should be summarily denied.

Swift-Eckrich's Motion is also procedurally and substantively infirm. Swift-Eckrich did not object to this purportedly "obvious" inconsistency in the verdict until after the jury had been discharged. It has, therefore, waived any right to rely upon such an inconsistency. If there truly was such an inconsistency (which there was not), the Court should have been given the opportunity to resubmit the issue to the Jury to clarify its verdict. Further, Swift-Eckrich submits a proposed alternative judgment with its Motion, but it agreed to the form of the Judgment already entered in this case.

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The verdict is not inconsistent. While the Court is required to adopt any reasonable reconciliation of alleged inconsistent verdicts, it need not stretch to do so here. The jury's verdict is entirely consistent with the Court's instructions. The instructions on intentional interference with prospective economic advantage allowed damages only upon proof regarding specific customer relationships. Consistent with the law set forth by the United States Supreme Court and United States Court of Appeals for the Tenth Circuit, the Court instructed that antitrust law permits a broader standard of damages, including past and future lost profits, and does not require precision in the proof thereof. The fact that the jury awarded $6 million in antitrust damages, and $2 million in tort damages is entirely consistent with these instructions and can in no way entitle Swift-Eckrich to remittitur or new trial.

BACKGROUND

Following approximately eight days of jury trial, on March 19, 2003, the jury reached a verdict. (*See* Exhibit "A" attached hereto). The Jury awarded Unitherm (hereafter "Plaintiff") damages on the claim of attempted monopolization in the amount of $6,000,000. The jury awarded damages on the claim of intentional interference in the amount of $2,000,000, and found by clear and convincing evidence that Defendant acted in reckless disregard of the rights of others. After the second stage punitive damages proceedings, the jury awarded Plaintiff an additional $2,000,000 in punitive damages against Swift-Eckrich on the claim of intentional interference.

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After the parties conferred, Plaintiffs and Defendant agreed to a form of judgment trebling the jury verdict on the antitrust claim, it having been agreed that any damages on the intentional interference claim are subsumed within the antitrust damages.

Defendant did not raise an objection at trial that the jury's verdict was somehow inconsistent. When the parties were discussing the proper form and amount of judgment to be entered, Defendant never raised an objection or any other concern that the jury had somehow already trebled the damages. At no time prior to the verdict being rendered, did the Court, or anyone else, suggest to the jury that their damages for antitrust damages should be trebled.

ARGUMENT AND AUTHORITY

A. Swift-Eckrich Has Waived Any Objection To The Verdict By Its Failure To Object Prior To The Discharge Of The Jury.

Swift-Eckrich has waived its right to raise the issue of inconsistent verdicts by failing to object before the jury was discharged. The Tenth Circuit[1] has held as follows: "A failure to object to general jury verdicts on the ground of inconsistency before the jury is discharged constitutes waiver . . ." *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993). In *Stone*, the Tenth Circuit found that where

[1] Where a party raises an argument of inconsistent verdicts, the Federal Circuit follows the law of the regional forum circuit, here the Tenth Circuit. *See EMI Group N.Am., Inc. v. Cypress Semiconducter Corp.*, 268 F.3d 1342, 1347 (Fed. Cir. 2001).

the verdict form contained a single question as to each count for liability and a separate question for each count as to damages, the verdict form was a "general verdict." *Id.* at 1545-46; *see also Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 944-45 (10th Cir. 1994) (appellant waived argument relating to inconsistency in general verdict with special interrogatories and reviewed for plain error where not raised before discharge of jury).

"The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury." *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996) (citing cases). The court in *Coralluzo* quoted the First Circuit as follows:

> To allow a new trial after the objecting party failed to seek a proper remedy at the only time possible [i.e., before the jury is discharged] would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures . . . by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.

Id. (quoting *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981)).

The verdict form in the case at bar is conceptually identical to the form in *Stone*. The jury was asked to find liability as to each cause of action and then asked to find damages for each count if a liability verdict was found. Swift-Eckrich's failure to raise this issue before the discharge of

the jury constitutes a waiver, and the Court should reject its Motion. While no inconsistency existed in the verdict, the jury in this case could have quickly and easily corrected any ambiguity or inconsistency in its verdict had Swift-Eckrich raised it before they were discharged. Defendant cannot now use their own neglect to their strategic advantage and gain another bite at the damages apple.

B. Swift-Eckrich Is Not Entitled to Remittitur or New Trial.

1. Standard On New Trial Motion Challenging Damages Or Raising An Inconsistency In the Verdict.

The standard on a motion for new trial is high, and Swift-Eckrich's Motion is very weak. To prevail on its Motion, Swift-Eckrich must carry the burden to show that "the verdict is 'clearly, decidedly, or overwhelmingly against the great weight of the evidence.'" *Patton v. TIC United Corp.*, 77 F.3d 1235, 1242 (10th Cir. 1996) (quoting *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616-17 (10th Cir. 1984)).

"[T]he jury, which has the first-hand opportunity to hear testimony and observe the demeanor of witnesses, has discretion to fix damages. We will not disturb a jury's award of damages unless the award is so unreasonable 'as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial.'" *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1300-01 (10th Cir. 1998) (quoting *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985)). Likewise, the Tenth Circuit

recently affirmed this Court's denial of a remittitur and new trial motion stating the following:

> We review a district court's disposition of a motion for remittitur or new trial on damages for a manifest abuse of discretion. . . . In order to establish an abuse of discretion, the party that moved unsuccessfully for a new trial on the basis of an excessive verdict carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence. In applying the abuse of discretion standard, we are also mindful that absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Telecor Comms., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1143 (10th Cir. 2002).

Further, Swift-Eckrich must "show that any verdict inconsistency demonstrates 'either confusion or abuse on the jury's part.'" *Domann v. Vigil*, 261 F.3d 980, 983 (10th Cir. 2001) (quoting *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865, 868 (10th Cir. 1976)). "In determining whether there is any inconsistency, we must accept any reasonable explanation that reconciles the jury verdict." *Id.* "[T]he trial court has a duty to try to reconcile the answers to the case to avoid retrial." *Harvey v. General Motors Corp.*, 873 F.2d 1343, 1346-47 (10th Cir. 1989).

Swift-Eckrich is legally off base in its attempt to find a conflict by looking only at the two verdicts. The Court may not confine itself to such a narrow view of the case:

> The reconciliation of the jury's responses, however, is not merely to one another, but to the entire *case*. . . . "Presumptions and intendments will not be indulged to establish a contradiction, it being the duty of the court to reconcile or harmonize the special findings or answers to special interrogatories *with each other*, if it can reasonably be done." . . . More recently, in *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1425 (10th Cir.), *cert. denied*, 479 U.S. 1007, 107 S. Ct. 647, 93 L.Ed.2d 702 (1986), we reconciled the jury's verdict on each separate cause of action to the case rather than to one another.

Id. at 1348 (quoting *Bass v. Dehner*, 103 F.2d 28, 34 (10th Cir. 1939)).

Moreover, a Court may not simply recalculate the jury's damages determination based upon its own view of the case without running afoul of the Plaintiffs' Seventh Amendment right to a jury trial. Swift-Eckrich's efforts here to indulge all inferences in its favor in order to create an inconsistency in the jury's verdict "results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S. Ct. 780, 786 (1962).

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2. The Jury's Verdict Was Entirely Consistent Under Any Standard.

Swift-Eckrich has not identified any rational or reasonable support for its contention that the jurors disregarded the instructions and trebled the damages, themselves. In fact, its explanation that the jury *sua sponte* trebled its own damages award is without any record support and is simply baffling.

None of the instructions read by the Court refer to trebling damages. None of the testimony referred to trebling damages. None of the argument from counsel referred to trebling damages. Yet, Swift-Eckrich asks the Court to take a giant inferential leap on its behalf and find that the jury trebled the damages themselves, because the foreman is the Chairman of a university Political Science Department. One would presume that the Chairman of the university Political Science Department would also know enough about the judicial system to have understood Judge Cauthron's instructions on damages and the different roles of judges and juries.

Crediting Swift-Eckrich's arguments in this regard would turn the judicial system on its head. Contrary to all law in every federal judicial circuit, Swift-Eckrich asks the Court to give the party against whom a jury has rendered a damages verdict every favorable inference, even the wild inference proffered by Swift-Eckrich. Instead, it obviously is the Court's duty to presume that the jury followed the instructions and grant the jury determination every rational inference in favor of upholding the verdict.

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Because Swift-Eckrich has not identified any inconsistency in the verdict, neither the Court nor Plaintiffs should be required to attempt to reconcile them. Nevertheless, not only are these verdicts reconcilable, but they are entirely consistent with the standards set forth in the instructions. The alleged inconsistency identified by Swift-Eckrich simply does not exist.

Once again, Swift-Eckrich contends that because Plaintiff put on proof of lost profits regarding both the antitrust and tort claims, the jury necessarily must have found only $2 million damages and then trebled the damages themselves to reach the $6 million antitrust verdict. Consequently, Swift-Eckrich argues, it is entitled to a remittitur of the $18 million antitrust verdict to $6 million.[2]

Swift-Eckrich is incorrect. The verdicts are consistent and do not need reconciling. The two counts were not based upon the same legal standard. Regarding Plaintiff's standard of proof for liability on its claim for attempted monopolization, the Court instructed the Jury as follows:

> It is not necessary that you find that all of Defendant's conduct being challenged by Plaintiff was predatory or exclusionary for Plaintiff to

---

[2] As Swift-Eckrich has presented absolutely no proof that the jury trebled the damages, its argument begs the question why the tort damages should not be increased by additur to $6 million if the two verdicts were based on the same standard, as it asserts (thereby entitling the jury to return punitive damages of $6 million, also). Why should Swift-Eckrich, the losing party, be given the presumption that the jury erred in its favor?

> prevail. It is enough for you to find that any one or more of the separate forms of Defendant's conduct, any combination of Defendant's conduct, or the totality of Defendant's conduct was predatory or exclusionary.

(Instruction No. 12, attached hereto as Exhibit "B".) Likewise, on dangerous probability of success, the Court instructed as follows:

> A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, that there was a reasonable likelihood that Defendant would ultimately achieve its goal of monopoly power.

(Instruction No. 13, Ex. B.) Further, regarding Attempt to Monopolize Injury, the Court instructed as follows:

> To establish injury, Plaintiff must prove that some damage flowed to Unitherm as a result of Defendant's alleged attempt to gain a monopoly. The fact that Plaintiff suffered economic losses or hardship is not enough. Plaintiff must demonstrate those economic losses or hardship were at least in part the result of Defendant's attempt to gain a monopoly. Plaintiff is not required to prove that Defendant's alleged attempt to gain a monopoly was the sole cause of their injury; nor must Plaintiff eliminate all other possible causes of injury. It is enough if Plaintiff

> proves that the alleged attempt to gain a monopoly was a material cause of its injury. Injury may be established by inference or circumstantial evidence. . . .

(Instruction No. 14, Ex. B.) Consequently, to prevail on Plaintiff's antitrust claim, it was not required to prove any special injury or relationship with a particular customer.

By contrast, the Court instructed the jury upon a more rigorous standard of liability on Plaintiff's tortious interference count requiring the identification of a specific relationship:

> Interference includes inducing a third person not to enter into the prospective relation or preventing the other party from acquiring the prospective relation. . . . The interference is intentional if Defendant acted with the purpose to interfere with the relationship or expectancy.

(Instruction No. 15, Ex. B.) The Court further instructed as follows:

> Plaintiff must show that the business relationship or expectancy that was interfered with was between Plaintiff and a third party. . . .
>
> * * * *
>
> Plaintiff may not rely solely on generalized evidence of lost sales based on past or present sales levels, future sales projections or industry trends.

(Instruction No. 16, Ex. B.) The Court also instructed that "Plaintiff must show that Defendant acted with the intent to interfere with *the* relationship or expectancy." (Instruction No. 17, Ex. B; emphasis added).

Thus, losses from interference with specific customers are subsumed within Plaintiff's overall lost profits. But Plaintiff's proof of lost profits as a result of Defendant's antitrust violations was not confined to specific customer relationships.

This view of the verdicts is made manifest by the Court's instructions as to damages. Regarding the attempt to monopolize cause of action the Court instructed on damages as follows:

> In arriving at the amount of the award, you should include any damages suffered by Plaintiff because of lost profits; that is to say, profits that Plaintiff would have made, but for the unlawful conduct of Defendant.
>
> The fact that the precise amount of Plaintiff's damages may be difficult to ascertain should not affect Plaintiff's recovery, particularly if Defendant's wrongdoing has caused the difficulty in determining the precise amount. . . .
>
> In determining the amount of profits lost by Plaintiff, you may consider evidence relating to the profits Plaintiff has not received in the past, and will not receive in the future, because of Defendant's past unlawful conduct.

> You may calculate Plaintiff's past and future lost profits by considering evidence of the market share Plaintiff would have had in the absence of Defendant's conduct, evidence of the size of the market, and evidence relating to the profit margin Plaintiff would have secured on the browning lines included in that market. In other words, Plaintiff's lost profits constitute the difference between what Plaintiff could have earned in an open market had there been no unlawful conduct by Defendant, and what Plaintiff actually earned and will earn.
>
> In determining whether or not any part of Plaintiff's damages constitute future lost profits, you must consider the experience of Plaintiff's officers in the business, the competition that Plaintiff would have had in the United States, and the general market conditions in such area.

(Instruction No. 21, Ex. B.)

This is a much broader standard than that set forth in Instruction No. 16 above with respect to liability for intentional interference, which excluded the jury from considering some of the evidence expressly set forth in Instruction No. 21. While the jury could consider generalized evidence of lost profits, past and future, and market conditions with respect to the antitrust claim, the jury was prohibited from doing so regarding the tort claim, without proof of interference with a specific relationship. Plaintiff's damages expert, Dr. Jeffrey Kinrich, calculated Plaintiff's lost profits through the year 2003. (Defendant's Exhibit 1 to

Motion, p. 8, lines 9, *et seq.*) Instruction No. 22 relating to damages for intentional interference further confirms this distinction by omitting the broad language of Instruction No. 21 and instructing the jury: "These damages are measured by the amount of money that will compensate Plaintiff for the loss of the economic relationship." (Instruction No. 22, Ex. B).

The explanation for the difference in the verdicts, therefore, is that the jury followed the instructions of the Court and applied a more stringent test for liability and damages for intentional interference.

The jury's verdicts are further buttressed by the law of antitrust damages. The Court's decision to establish a less rigorous standard of damages proof for the antitrust claim follows long-standing Supreme Court and Tenth Circuit law. *Texaco, Inc. v. Hasbrouk*, 496 U.S. 543, 572-73, 110 S. Ct. 2535, 2551-52 (1990) ("At the same time, however, we reaffirmed our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury;" possible flaw in jury's damages calculation would not be sufficient to grant JNOV). The Tenth Circuit recently affirmed an antitrust damages verdict in this Court stating as follows:

> [Defendant] faces a steep uphill climb in attempting to overturn the jury's damages award. In addressing a challenge to a jury's damage award in an antitrust case, the Supreme Court held that the award "must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion

> from the facts." . . . We have said that, even where a "persuasive" explanation of the jury's damages award indicates an award contrary to law, the possibility of a proper explanation, "[h]owever slight the chance," will suffice to sustain the damages award.

Telecor Comms., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1143 (10th Cir. 2002) (internal citations omitted); *see also Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1525-26 (10th Cir. 1984), aff'd, 472 U.S. 585, 105 S. Ct. 2847 (1985) (explaining why damages in antitrust cases necessarily rely upon estimates of injury which may not be sufficient in other contexts).

Not only is there a rational explanation to reconcile the jury's verdicts on the antitrust and tort claims, but the most reasonable and natural explanation supports it -- the jury followed the instructions and the law. Furthermore, Defendant did not object to any of the Court's damages instructions. (Instruction Nos. 20, 21, 22, 23, 24, Ex. B).

CONCLUSION

The foregoing considered, Swift-Eckrich's Motion for Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages is meritless and should be summarily denied.

Appendix K

Dated: April 28, 2003

Respectfully submitted,

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APPENDIX L — REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH, INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL FILED MAY 7, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV 01-347-C

UNITHERM FOOD SERVICES, INC., an Illinois corporation; and JENNIE-O-FOODS, INC., a Minnesota corporation,

Plaintiffs,

vs.

SWIFT-ECKRICH, INC. d.b.a. CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH. INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL

Appendix L

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Appendix L

REPLY BRIEF OF DEFENDANT SWIFT-ECKRICH, INC. IN RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR REDUCING DAMAGE AWARD OR FOR NEW TRIAL

I. SWIFT-ECKRICH'S RIGHT TO A REMITTITUR OR NEW TRIAL HAS NOT BEEN WAIVED.

Under Fed.R.Civ.P. 59(e), a motion to amend a judgment is timely if made within 10 days of the entry of that judgment, a requirement that indisputably has been met by Swift-Eckrich. Nevertheless, Unitherm argues that this motion is untimely because Swift-Eckrich purportedly was required to make the motion before the jury was discharged.

The most recent Tenth Circuit case that addresses Unitherm's "waiver" argument *is Brown v. Presbyterian Health Care Services,* 101 F.3d 1324, 1332 (10th Cir. 1996). The facts of *Brown* are strikingly similar to the facts of this case. Indeed, there is no closer precedent. In *Brown,* the jury awarded both compensatory and punitive damages on an antitrust claim. The district court granted the defendant's motion to amend the judgment under Rule 59(e), eliminating the punitive damages. The Tenth Circuit held that this ruling by the district court was "proper and in accordance with the law." *Id.* at 1339. The Court rejected the plaintiff's waiver argument based on the absence of an objection before the jury was discharged, and there is no more basis for that argument here than there was in *Brown.*

The holding of the Brown case on the substance of the matter was that: "[i]t is clearly improper to allow a plaintiff

to recover punitive damages along with trebled damages on an antitrust claim." *Id.* at 1332. A further holding was that: "[t]he district court's decision to vacate the award of punitive damages served to correct a manifest error of law and did not prejudice [the plaintiff]." *Id.* By the same reasoning, it is improper in this case for the Court to have trebled antitrust damages when the circumstances compelled the conclusion that those damages have already been trebled by the jury. This Court should, therefore, correct that error of law.

It is particularly important to note that we are not concerned here with any inconsistency ***within the verdict itself***. In theory, there is no reason why the damages for antitrust violations could not have been $6 million, or why the intentional interference damages could not have been $2 million, assuming there was evidence to support these conclusions. However, this motion is based on the fact that neither the evidence nor the argument in this particular case can possibly provide a basis for the three-to-one ratio between the two awards. The problem here is not that there is inconsistency within the verdict, but that the evidence does not support the verdict and compels the conclusion that there was an error of law, *i.e.*, that the jury trebled the compensatory damages.

Before discussing the authorities relating to Unitherm's waiver argument, it is helpful to put this argument in context. It has not been contended by Unitherm -- nor by anyone else, to our knowledge -- that the right to make a motion for a new trial is always waived unless made before discharge of the jury. Any such contention would contradict the plain language of Rule 59 itself. Logically, a waiver can occur only

when the failure to make the motion before discharge of the jury deprives the court of an opportunity to take some corrective action permitted under the particular circumstances of the case.

That corrective action is uniquely provided for in Rule 49(b),[1] which allows the Court to "return the jury for further consideration." However, there is no similar option to "return" a jury to be found anywhere *except in* Rule 49(b). Thus, the rule can be applied only when two conditions are met: (1) there is a general verdict, not a special verdict under Rule 49(a)[2]; ***and*** (2) the general verdict is "accompanied by

[1] Rule 49(b) provides: "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. ***When the answers are consistent with each other but one or more is inconsistent with the general verdict***, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, ***or the court may return the jury for further consideration of its answers and verdict or may order a new trial***. When the answers are inconsistent *with* each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." (Emphasis added.)

[2] Rule 49(a) provides, in pertinent part: "The court may require a jury to return only a special verdict in the form of a special written

(Cont'd)

answers to interrogatories." Fed.R.Civ.P. 49(b). Accordingly, there can be no waiver if there is a ***special*** verdict, nor if there is a general verdict ***without*** interrogatories.

The waiver rule now relied upon by Unitherm appears to have originated in the Tenth Circuit in *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986), which cites no earlier precedent. Two aspects of *Diamond Shamrock* make clear that waiver is not appropriate under the circumstances of this case. First, the *Diamond Shamrock* Court, sought to "harmonize" the timeliness provisions of Rule 59 with Rule 49(b), which pertains to a "General Verdict Accompanied by Answer to Interrogatory." *Id.* at 1421. Under Rule 49(b), as noted above, a procedure exists that allows the court to "return the jury for further consideration of its answer," but only where there is a general verdict ***with interrogatories.*** *See id.* at 1421. To reach its finding of waiver, the *Diamond Shamrock* court had to treat the verdict before it as if it were an inconsistent general verdict ***with interrogatories***,[3] to which no objection was asserted before

(Cont'd)
finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate . . . ."

[3] This is exactly what the majority in *Diamond Shamrock* did. The dissent observed: "Although nothing in the court's opinion suggests that this 'general verdict' was accompanied by responses to 'written interrogatories,' the court relies on Rule 49(b) of the Federal Rules of Civil Procedure to reach the conclusion that 'the instant case is a proper case to invoke the harsh impact of the waiver rule.'" *Id.* at 1426.

discharge of the jury. In contrast, in this case, there was no general verdict with interrogatories, no invocation of Rule 49(b), no option for the Court to return the jury for further consideration, no competing Rules to harmonize, and therefore, no basis for finding a waiver.

A second aspect of *Diamond Shamrock is* that: "[t]he trial court had previously informed counsel that the jury's general verdict should be carefully examined and any objections thereto lodged." *Id.* at 1421-22. It was under these circumstances that a waiver was found because appellant *"did not* move for resubmission pursuant to Rule 49(b) before the jury was discharged." *Id.* at 1422 (Emphasis in original.) In the present case, however, no such instruction to counsel was given, nor could such an instruction have been given since Rule 49(b) was not involved.

Unitherm, making an unsound waiver argument, relies on cases that predate the holding in *Brown* that there was no waiver. *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 944-45 (10th Cir. 1994) involved interrogatories and thus ***did*** invoke Rule 49.The *Thompson* court explicitly recognized the invocation of Rule 49(b) and stated:

> In this instance Part 1 of the Verdict Form reproduced in the Appendix is plainly a ***general verdict*** (see, *e.g., Stone,* 998 F.2d at 1547), while Part 4 just as plainly sets out ***accompanying interrogatories***.

Id. at 944-45 (emphasis added.) (The verdict form is reproduced at page 945 of the Court's opinion.) Thus,

Thompson is entirely consistent with *Diamond Shamrock* in that the waiver was premised on the invocation of the provisions of Rule 49(b). Although courts may at times, in this context, simply contrast special verdicts under Rule 49(a) with "general verdicts" under 49(b), it is nevertheless clear in context that the waiver rule applies only to those general verdicts ***that include interrogatories***. Indeed, another case cited by Unitherm, *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 186, 186 (11th Cir. 1996), also explicitly bases its finding of a waiver on the court's concern with "the possible misuse of ***Rule 49 procedures***." *Id., quoting Skillin v. Kimball,* 643 F.2d 19, 20 (1st Cir. 1981) (emphasis added).

The other cases cited by Unitherm are likewise consistent with the view that waiver for failure to object occurs only where the verdict involved interrogatories to the jury. In *Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1545, the court relied on *Diamond Shamrock* and stated that objections are unnecessary in the case of a special verdict, but necessary in the case of a general verdict. *Id.* at 1047-48. However, the verdict included the 25 separate questions (reproduced on page 1546 of the opinion) and apparently many more. Obviously, the special interrogatory provision of Rule 49(b) was found to have been invoked. In this case, however, there were no interrogatories, Rule 49(b) is not invoked, and there was no option to return the jury for further consideration. Again, there was no harmonizing between Rule 49 and 59 to be done. Thus, the waiver rule does not apply here.

In *Clyde v. General Motors Corp.*, 988 F.2d 1039 (10th Cir. 1993), another case addressing Unitherm's waiver argument, it is unclear whether or not interrogatories under

Rule 49 were involved, but is at least clear that, as in *Diamond Shamrock,* the court specifically instructed counsel to make any objections prior to discharge of the jury. *Clyde* cited and relies on *Diamond Shamrock. Id.* at 1048.

The Tenth Circuit has more recently confirmed that grant of a new trial is the proper remedy in circumstances similar to those at bar. In *Cholier, Inc. v. Torch Energy Advisors, Inc.*, 1996 U.S. App. LEXIS 9518 (10th Cir. 1996)[4] (an unpublished opinion rendered after appeal from judgment entered by Judge Leonard of the Western District of Oklahoma) plaintiff presented evidence of an agreement under which defendant was to pay a 15 percent contingency fee in connection with settlements that plaintiff negotiated with third parties. Plaintiff also asserted that there was an additional "agreement to agree" that allowed for a 30 percent recovery. The jury entered a general verdict awarding damages based on the 30 percent amount. Defendant moved under Rule 59 for a new trial on the ground that the jury's award was speculative and/or excessive. *Id.* at *15. The District Court denied the motion, and the Tenth Circuit reversed.

The appellate court rejected plaintiffs argument that "the general verdict form prevents us from knowing how the jury calculated damages." *Id.* at *6. Rather, it found that a new trial is proper "when the verdict is clearly and decidedly against the weight of the evidence," or when the "jury's award is speculative or excessive." *Id.* at * 14-15, citing *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995),

[4] Pursuant to 10th Circuit Local Rule 36.3, a copy of the case is attached.

cert. denied 116 S.Ct. 1017 and *Collier v Hoisting & Portable Eng'rs Local* Union No. 101, 761 F.2d 600, 603 (10th Cir. 1985).

> [T]he evidence must be considered in light of the requirements of the underlying cause of action. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir. 1984) (approving order for new trial where jury's verdict indicated a misunderstanding and misapplication of damages applicable to breach of contract and fraud claims. Thus, where it is apparent that certain identifiable sums were improperly included in the jury's verdict, an order of remittitur is appropriate, with an alternative order for a new trial if the plaintiff refuses to accept the remittitur.

Id. at * 16. The Court found that under Oklahoma law, any purported agreement to pay more than a 15 percent fee was too vague to be enforceable. "Thus, in basing its damages award on the 30% figure, the jury impermissibly ignored its instructions that damages for the breach of contract 'cannot be contingent or speculative.'" Accordingly, it was held that the District Court abused its discretion by denying defendant's motion for new trial. *Id.* at *19. Consistent with *Brown,* there is no indication in *Collier* that any request for a new trial was made or any relevant objection made before the jury was discharged.

II. IT IS WITHIN THIS COURT'S "CONSIDERABLE DISCRETION" TO REDUCE A DAMAGES AWARD WHERE, AS HERE, THE JURY HAS AWARDED IMPROPER AND EXCESSIVE DAMAGES.

A. Unitherm Badly Misstates The Moving Party's Burden On A Motion For Remittitur Or New Trial.

Unitherm erroneously suggests that Swift-Eckrich cannot prevail unless it meets an appellant's burden of proving that the district court abused its discretion in denying a motion for a new trial. For example, Unitherm offers a partial quotation from *Patton v. TIC United* Corp., 77 F.3d 1235, 1242 (10th Cir. 1996) to support its assertion that: "[t]o prevail on its Motion, Swift-Eckrich must carry the burden to show that 'the verdict is "clearly decidedly, or overwhelmingly against the great weight of the evidence.'" (Opp., p. 5.) Yet a more complete quotation from the same case makes quite clear that this standard guides the *reviewing* court, not the district court:

> A motion for a new trial on the ground that the verdict is against the weight of the evidence presents a question of fact, ***and we will not reverse*** unless the verdict is 'clearly, decidedly against the weight of the evidence.' *Id.*, emphasis added.

For the same reason, the other cases cited in the Opposition are unhelpful, as the quotations provided by Unitherm also describe the standards on ***appeal*** from an order denying a new trial. *E.g., Sanjuan v. IBP, Inc.,* 160 F.3d 1291,

1300-01 (10th Cir.1985) (appellate court will not disturb jury award except in certain circumstances); and *Telecor Comms., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1143 (10th Cir. 2002) ("in order to establish *abuse of discretion,*" party that unsuccessfully moved for new trial has burden of demonstrating verdict was "clearly, decidedly, or overwhelmingly against the weight of the evidence"). At most, these cases merely reaffirm what the Tenth Circuit made clear in *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d at 1332: "to grant or deny a Rule 59(e) motion to alter or amend a judgment, *the district court is vested with considerable discretion." Id*; *see also Harvey v. General Motors Corp.*, 873 F.2d 1343, 1346-47 (10th Cir. 1989) (cited at page 6 of the Opposition; "[a] district court has broad discretion in deciding whether to grant a motion for a new trial").

B. Even Granting Unitherm Every Favorable Inference, The Jury's Verdict Still Reflects A Manifest Error Of Law.

As explained in the Motion, Tenth Circuit authority authorizes the district court to order a remittitur or new trial where the jury has awarded damages that are excessive and/or are not allowed by law.[5] Moreover, where the plaintiff tries its case as "one set of facts demonstrating a single injury for which the jury could find liability under any one or all of [multiple] theories," other Circuit Courts have found

[5] *See Brown*, 101 F.3 d at 1332; *Guides, Ltd. v. Yarmouth Group Property Mgt., Inc.*, 295 F.3d 1065, 1076-77 (10th Cir. 2002); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167, 1178 (10th Cir. 1981).

"lopsided" damages awards -- ***without other evidence of juror misconduct or confusion*** -- to be a sufficient basis for concluding that the jury awarded damages that were excessive and/or contrary to law. *Video Int'l Production, Inc. v. Warner Amex Cable Communications, Inc.*, 858 F.2d 1075, 1085 (5th Cir. 1988); Rosario v. Livaditis, 963 F.2d 1013, 1020-21 (7th Cir. 1993). Unitherm makes no effort to distinguish these cases.

Contrary to Unitherm's suggestion, the error in the jury's award becomes clear when the verdict is considered in light of Unitherm's own arguments and evidence. Nowhere in the opposition does Unitherm deny that it argued vigorously for jury instructions that did not require it to present evidence of sales lost to intentional interference on a ***customer-by-customer*** basis, and that the Court agreed and gave the requested instructions over Swift-Eckrich's objection. Even more critically, Unitherm does not deny that it *did not present **evidence** from which the jury could have arrived at an antitrust award that was different from its intentional interference award.* Even though Unitherm identified lost prospective customers (e.g., House of Raeford, Sara Lee, Farmer John, Kraft, Zacky Farms, Carolina Turkey Company, Willow Brook Farms, Smithfield Foods and Farmland Foods), it did not present any evidence to quantify the profits it assertedly would have realized from these companies. Instead, it relied solely on a generalized damages calculation that used past sales levels to project lost profits, and it argued to the jury that the same calculation applied to both the antitrust and intentional interference counts. Therefore, differences in the instructions for intentional interference (compensation for "loss of the economic relationship") and

antitrust (damages "because of lost profit") cannot explain the verdict. Unitherm offered the jury only one way to calculate damages.

Viewed in light of Unitherm's own limited damages evidence, the three-times antitrust award unmistakably points to the jury's improper multiplication of the damage. There is ample basis for the Court to exercise its discretion to order a reduction of the antitrust compensatory damages award to $2 million.

III. CONCLUSION.

To prevent a manifest miscarriage of justice, the Court is respectfully requested to issue a remittitur reducing the amount of antitrust damages from $18 million to $6 million and enter the [Proposed] Amended Judgment filed concurrently herewith. If Unitherm refuses to accept the remittitur, the Court should order a new trial on the issue of antitrust damages.

Dated: May 7, 2003

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Appendix L

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-6177

CHOLIER, INC.,

Plaintiff-Appellee,

v.

TORCH ENERGY ADVISORS, INC. and
Search Drilling Co.,

Defendants-Appellants.

- *1996 U.S. App. LEXIS 9518*

April 24, 1996.

JUDGES:

Before ANDERSON, TACHA, and BALDOCK, Circuit Judges.

OPINION BY:

STEPHEN H. ANDERSON

Appendix L

OPINION:

ORDER AND JUDGMENT*

Cholier, Inc. brought this diversity action against Torch Energy Advisors, Inc. ("Torch Energy") and Search Drilling Co. ("Search"), alleging claims for breach of contract and unjust enrichment, together with various related tort claims. At the close of Cholier's case in chief, the defendants (collectively "Torch") moved for judgment as a matter of law on all claims, at which time the district court granted the motion on all Cholier's tort claims except for the fraud claim. At the close of all the evidence, the court granted judgment as a matter of law on the fraud claim, and it submitted the claims for breach of contract and unjust enrichment to the jury. The jury found against Torch on the breach of contract claim. Torch appeals the district court's denial of its post verdict motion, pursuant to Fed.R.Civ.P. 50 and 59, for judgment as a matter of law or alternatively for a new trial on the contract claim. Torch contends that the evidence conclusively establishes that there was no agreement between the parties on essential contract terms and that, in any event, the damages evidence was too speculative and imprecise. Alternatively, Torch argues that the jury award of damages was against the weight of the evidence. We affirm the district court's denial of Torch's motion for judgment as a matter of law. We reverse the district court's judgment denying Torch

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

a new trial, and we remand and order a remittitur of damages, or a new trial on damages if Cholier refuses the remittitur, as set forth below.

BACKGROUND

Cholier is an Oklahoma company that provides consulting services to owners of oil and gas properties. Torch Energy is a Houston based company that manages oil and gas properties for investors. Search is a corporation purchased by Torch Energy that owned and operated oil and gas properties in Oklahoma.

This action involves Cholier's claim that it had an oral contract with Torch to settle certain natural gas take-or-pay claims which Search had against Northern Natural Gas Company ("Northern"), and that Torch breached that contract.[1] According to Cholier president Rick Cline, he and Dee Davis of Torch had numerous telephone conversations regarding Cholier's representing Torch in negotiations with Northern. Cline testified that during a telephone conversation on March 4, 1992, Davis hired Cholier, agreeing to pay Cholier 15% of the sums recovered, and agreeing to consider a higher fee based on the work involved. According to Cline's testimony, Davis said, "Rick, I can go ahead and agree to this [Cholier's representation] and the 15 percent rate," to which Cline said, "[T]hat's great. At the same time, I think there [are] sufficient things to be developed on the Search claim that I would like a higher percentage." Appellant's

[1] Northern purchased gas from Search wells under an agreement which obligated Northern to accept a certain quantity of gas or to pay for that quantity even if Northern did not accept it.

App., Vol. I at 196. In response to repeated questions, Cline consistently characterized the arrangement as a firm agreement based on a floor contingency fee of 15%, with an agreement to discuss a higher percentage once Torch reviewed Cholier's schedules. *Id.* at 198, 217, 223; Vol. II at 349.

As background to the March 4 conversation, Cline testified that the parties had already discussed the wells to be included, as those "that had been reserved by the FDIC." Vol. I at 194. In a letter confirming the telephone conversation, Cholier identified the wells to be included in the claim against Northern in an attached schedule which listed "certain wells that were originally included with Search." Cholier letter to Torch dated March 5, 1992, Vol. III at 1046; Vol. I at 204. According to the letter, Torch was to update the schedule to indicate any changes in ownership. Vol. III at 1046. Cline further testified that the contract was later confirmed in a conversation between him and Sue Ann Craddock of Torch, during which Craddock said, "Rick we've got a deal." Vol. I at 218. Cline stated that, thereafter, a Torch representative came to his office to review and copy his background work product, and that Torch then breached the contract by notifying Cholier that it would not be using Cholier's services, but would be negotiating with Northern on its own behalf.

As evidence of damages, Cholier presented an expert's testimony that Cholier would have been able to recover $859,325.86 for Torch from Northern.[2] Although Cholier

[2] Although this recovery figure is greater than the $550,000 which Torch was able to recover on its own, it represents the (Cont'd)

admitted that the parties never agreed on any fee beyond the 15% floor, it argued entitlement to damages based on a "reasonable fee" of 30% of $859,325.86. Vol. I at 217, 223; Vol III at 1012-13.

Torch characterizes the events differently. According to Torch, Cholier had merely made unsolicited proposals to which Torch never agreed, and, in any event, Cholier's own version of events indicated that there was no meeting of the minds on essential terms. Thus, Torch argues that Cline's testimony establishes that the parties never agreed on the price (*i.e.* the contingency fee percentage, or whether any fee was to be inclusive or exclusive of costs), that the wells to be included in *the* contract were not adequately identified (arguing, inter alia, that the schedule attached to Cholier's letter cannot suffice since it clearly included well interests which Torch no longer owned), and there was no time specified for Cholier's performance.

The jury found that Torch breached a contract with Cholier, and awarded Cholier $257,797.76 which equals 30% of Cholier's estimated recovery of $859,325.86. It made no findings on the unjust enrichment claim. Following the adverse verdict, Torch made a Rule 50 motion for judgment as a matter of law on the contract claim, together with an alternative motion for a new trial pursuant to Rule 59. Cholier

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(Cont'd)

mathematical estimate of Cholier's expert as the amount Cholier would have been able to obtain. According to the expert, factors such as incorrect pricing data and failure to distinguish types of interests resulted in Torch's actual settlement being lower than Cholier would have been able to negotiate. Vol. II at 687-88.

opposed the motion, arguing that Torch was precluded from bringing it because Torch had failed to renew its original motion at the close of all the evidence. Cholier also contested on the merits.

Without explaining the basis for doing so, the district court rejected Cholier's waiver argument and found that Torch's motion should be considered on the merits. The court then denied the motion. On Torch's appeal from the district court's denial, Cholier continues its opposition based on waiver and the merits.

DISCUSSION

A. Preserving the Motion for Judgment as a Matter of Law Under Fed.R.Civ.P. 50

At the close of Cholier's evidence, Torch moved for judgment as a matter of law on all claims pursuant to Fed.R.Civ.P. 50. At the time of argument, the court specifically asked the parties to be brief, and the court also expressed a desire that the case finish that afternoon. Appellant's App., Vol. III at 796, 815. Following the lunch break, the district court granted the motion on all tort claims, except fraud, which the court inadvertently omitted, and the court denied the motion on the breach of contract claim and reserved its ruling on the unjust enrichment claim. *Id.* at 816-21. Torch then presented and rested its case that same afternoon.

After dismissing the jury for the day, the court held a dialogue in open court with the attorneys concerning

preparation of jury instructions. At that time Cholier's attorney advised the court that it had not ruled on the fraud issue contained in Torch's motion for a directed verdict. The court then reviewed its notes, granted the motion as to the fraud claim, and concluded, "So the issues in front of the Court and the parties and the jury are breach of contract or in the alternative quantum meru[i]t or the unjust enrichment theory." *Id.* at 991.

Subsequently, during the jury instruction conference the following Monday, Torch's counsel briefly referred to a renewed motion on the quantum meruit theory. Recalling that its ruling on that issue had been reserved, the court then denied the motion without hearing additional argument. *Id.* at 1005-06.

"[A] defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence. . . ." *Karns v. Emerson Elec. Co.,* 817 F.2d 1452, 1455 (10th Cir.1987).[3] In such instances, the defendant's failure to renew the motion not only bars the district court's subsequent consideration after the verdict, but also precludes our consideration on appeal. *Id.*

Torch argues that its situation is governed by *Trujillo v. Goodman,* 825 F.2d 1453, 1455-56 (10th Cir.1987), which approved a liberal construction for what constitutes a motion

[3] Fed.R.Civ.P. 50 currently employs the terminology "judgment as a matter of law" instead of "directed verdict" and "judgment notwithstanding the verdict," but the standards remain the same. *Id.* advisory committee's note to 1991 Amendment.

for a directed verdict. Thus, Torch contends that its renewed motion on the unjust enrichment claim suffices to preserve its right to bring the post verdict motion on all grounds. Alternatively, Torch argues that its situation is governed by *Armstrong v. Federal Nat'l Mortgage Ass'n,* 796 F.2d 366, 370 (10th Cir.1986), which held that failure to renew a motion at the close of all evidence would not constitute a waiver if the evidence introduced after the initial motion were brief and the court indicated that renewal would not be necessary to preserve the issues raised.

Cholier correctly counters that a motion under Rule 50 preserves only the grounds raised in that motion, and, moreover, the court's original unequivocal denial of the breach of contract issue does not indicate an intent to preserve the issue. *See First Sec. Bank v. Taylor,* 964 F.2d 1053, 1056-57 (10th Cir.1992); *Karns,* 817 F.2d at 1456.

However, Torch is also correct in noting that this court has "recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary." *Anderson v. United Tel. Co.,* 933 F.2d 1500, 1503 (10th Cir.), *cert. denied,* 502 U.S. 940, 116 L. Ed. 2d 327, 112 S. Ct. 357 (1991). Accordingly, we review a directed verdict motion "in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case." *Id.* Especially when, as in this case, the district court considered and rejected the waiver argument, we may conduct our own review of the record to determine whether there is an appropriate basis to sustain the court's action.[4]

[4] We may affirm on any grounds supported by the record. *United States v. Sandoval,* 29 F.3d 537, 542 n. 6 (10th Cir.1994).

As noted above, the record clearly demonstrates that Torch's Rule 50 motion was reopened at the close of all the evidence, at which time the court reviewed its notes, made additional rulings and expressly reiterated its decision on the full motion. Accordingly, under *Trujillo* and *Anderson,* the motion, in substance, was adequately renewed, considered, and preserved in its entirety for our review.

B. Ruling on the Motion for Judgment as a Matter of Law

We review de novo a district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the district court under Fed.R.Civ.P. 50. *Clark v. Brien,* 59 F.3d 1082, 1086 (10th Cir.1995), *cert. denied,* 133 L. Ed. 2d 747, 116 S.Ct. 800 (1996); *Thompson v. State Farm Fire & Casualty Co.,* 34 F.3d 932, 941 (10th Cir.1994). Thus, we construe the evidence and inferences most favorably to the nonmoving party, without weighing the evidence, passing on the credibility of witnesses, or substituting our judgment for that of the jury. *See Rajala v. Allied Corp.,* 919 F.2d 610, 615 (10th Cir.1990), *cert. denied,* 500 U.S. 905 (1991). However, "we must be guided by the requirements of the underlying cause of action." *Palmer v. City of Monticello,* 31 F.3d 1499, 1503 (10th Cir.1994).

Viewed in the light most favorable to Cholier, there was sufficient evidence to support a contract claim. That is, as previously set forth, Cholier's president Rick Cline testified that Torch representative Dee Davis hired his company in a telephone conversation on March 4, 1992, and that the agreed upon contract terms included a minimum 15% contingency fee, with increases subject to later negotiation, that the parties

had already discussed the wells to be included, which Cline generally identified in a confirmation letter which also included a schedule of wells which Torch was to update for current ownership, and that subsequently Torch representative Sue Ann Craddock confirmed to him that they had a deal. Appellant's App., Vol. I at 193-99, 204, 218.

Although Torch disputes these conversations and insists that the documentation supports its version of the facts, under the standards for Rule 50, the court must draw all inferences in favor of Cholier, and in favor of allowing the jury to resolve such disputes. Thus, the minimum terms of the alleged contract are not invalidated, as a matter of law, by the fact that the parties contemplated future negotiations to increase Cholier's compensation. That is, viewed in the light most favorable to Cholier, Cline's testimony could show acceptance as to those minimum terms, rather than a conditional acceptance or counter offer. Therefore, the parties' agreement to review certain terms at a later date would not necessarily void the minimum terms ab initio. Nor is the fact that Cholier was awaiting confirmation for the exact wells to be included fatal to finding a meeting of the minds, in light of Cline's testimony that the parties had agreed upon the parameters which would define the included wells. Finally, the fact that the contract contained no specified duration is not critical under Oklahoma law, inasmuch as its duration can be fairly implied from the contract's subject matter. *See R.S. Mikesell Assocs. v. Grand River Dam Auth.,* 627 F.2d 211, 212-13 (10th Cir.1980) (applying Oklahoma law). Accordingly, the district court did not err in finding sufficient evidence to warrant submission to the jury.

C. Motion for a New Trial Under Fed.R.Civ.P. 59

A finding of sufficient evidence to create a jury question under Rule 50 does not preclude a finding that the actual verdict rendered was against the weight of the evidence for purposes of Rule 59. *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 211 (3d Cir.1992), *cert. denied,* 507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993). Thus, when the verdict is clearly and decidedly against the weight of the evidence, a new trial is proper. *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir.1995), *cert. denied,* 116 S.Ct. 1017. Additionally, it is within the trial court's discretion to order a new trial on damages alone when the jury's award is speculative or excessive. *See Collier v. Hoisting & Portable Eng'rs Local Union No. 101,* 761 F.2d 600, 603 (10th Cir.1985). Moreover, in ruling on a motion for a new trial on grounds that damages are excessive, the trial court may order a remittitur, or alternatively a new trial if the plaintiff refuses the remittitur. *Klein v. Grynberg,* 44 F.3d 1497, 1507 (10th Cir.), *cert. denied,* 116 S.Ct. 58 (1995). In such cases, a motion for a new trial made on the grounds that the jury's verdict is against the weight of evidence usually presents a question of fact, rather than law, and is properly directed to the discretion of the trial court, which we review for manifest abuse. *Richardson v. City of Albuquerque,* 857 F.2d 727, 730 (10th Cir.1988).

However, as with a Rule 50 motion, the evidence must be considered in light of the requirements of the underlying cause of action. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir.1984) (approving order for a new trial where jury's verdict indicated a

misunderstanding and misapplication of damages applicable to breach of contract and fraud claims). Thus, where it is apparent that certain identifiable sums were improperly included in the jury's verdict, an order of remittitur is appropriate, with an alternative order for a new trial if the plaintiff refuses to accept the remittitur. *See Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 418 F.Supp. 1009, 1023 (D.N.J.1976), *rev'd on other grounds,* 570 F.2d 72 (3d Cir.1977), *cert. denied,* 436 U.S. 913 (1978).

Torch argues that there was no evidence to support the jury's specific award of a contingency fee amounting to 30% of the recovery that Cholier's expert calculated Cholier would have obtained had Cholier been permitted to perform the contract.[5] In response, Cholier contends that the general verdict form prevents us from knowing how the jury

---

[5] Torch also argues that Cholier's evidence on damages is so hopelessly flawed and insufficient that its use by the jury cannot be sustained. However, Torch challenged Cholier's expert during cross examination, and, apparently, the jury believed the expert's explanation as to the validity of her method. Torch further attacks the expert's estimate on other grounds, such as improperly included interests, but Torch failed to raise the argument below, and Torch points to nothing in the record which indicates it presented any evidence at trial to dispute the validity of such inclusions. Finally, Torch points to evidence that Cholier expended $216,000 in legal fees in settling its other clients' claims, and argues that the jury should have deducted that figure from Cholier's damages against Torch. However, Torch presented no evidence that would have allowed the jury to connect that expense with Cholier's recovery against Torch, and in fact, Torch appears to have resisted Cholier's efforts to relate the two in connection with its claimed damages against Torch. Appellant's App., Vol. I at 285-86.

calculated damages.[6] Cholier also counters that, in any event, the jury was justified in basing its verdict on a 30% contingency fee since there was evidence that such a fee is reasonable. However, this argument confuses Cholier's claim for breach of contract with Cholier's claim for unjust enrichment, and the cases cited by Cholier in support of the "reasonable value" of services figure are inapposite, as they concern contracts in which full performance has already been rendered.

Rather, Cholier's own citation of authority shows that: "In Oklahoma, the measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services." Appellee's Br. at 30 (quoting *Sharpless Separator Co. v. Gray,* 62 Okla. 73, 161 P. 1074 (Okla.1916) (construing a contract in which the breach occurred before plaintiff was allowed to perform)); *see also White v. American Law Book Co.,* 106 Okla. 166, 233 P. 426, 427 (Okla.1924) (limiting contingency fee recovery to amount named in the contract), *cited in* Appellee's Br. at 31.

Although Cholier claims that Torch agreed to consider a higher fee than the agreed upon "floor" of 15%, the evidence conclusively shows no further agreement was ever reached. Under Oklahoma law, that agreement to agree to more than

[6] We reject this argument outright. In fact, the damages are the exact amount urged by Cholier in its closing argument: "Therefore, you have only the figures of 30 percent from either side for a reasonable fee for contract between the parties. It is therefore straight mathematics to find the sum of $257,797.75 for Cholier's total damages in this case." Appellant's App., Vol. III at 1013.

the 15% fee is too vague to be enforceable.[7] *See American Automated Theatres, Inc. v. Hudgins, Thompson, Ball & Assocs.,* 516 P.2d 565, 567 (Okla.Ct.App.1973). Thus, in basing its damages award on the 30% figure, the jury impermissibly ignored its instructions that the damages for the breach of contract "cannot be contingent or speculative." Jury Instruction No. 18, Appellee's App., Tab 5. Accordingly, the district court manifestly abused its discretion in denying Torch's motion for a new trial.[8]

Since the extent of excess damages is clearly ascertainable, we remand with instructions that the court order a remittitur, with damages calculated on a 15% fee, to be awarded in the amount of $128,898.88, with the further order for a new trial on damages in the event Cholier refuses to accept the remittitur.

[7] Were it not for the evidence that the parties agreed on a floor contingency fee of 15%, we would necessarily find the whole contract unenforceable, thus warranting judgment for Torch under its Rule 50 motion. *See Dunn v. Dunn,* 391 P.2d 885, 887 (Okla.1964).

[8] Although Torch's notice of appeal indicated that it was appealing the separate judgment for attorney's fees which the district court granted Cholier as the prevailing party on a contract action under Okla. Stat. Ann. tit. 12, § 936 (West 1988), Torch made no arguments on the issue. However, in its own brief, Cholier requested attorney's fees on appeal, which request Torch countered in its reply brief. We agree with Torch that, inasmuch as the awarded damages were clearly excessive and improper, Cholier is not entitled to attorney's fees in this well-taken appeal.

Appendix L

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

APPENDIX M — PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED MAY 12, 2003 (R. A6514-6524)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC., and JENNIE-O FOODS, INC., now known as JENNIE-O TURKEY STORE, INC.,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003 PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND

Plaintiffs hereby respond to Defendant's "Motion to Amend Judgment Entered on April 9, 2003 Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond" (the "Motion") and state as follows:

I. SWIFT-ECKRICH'S MOTION BELATEDLY SEEKS TO AMEND THE UNDERLYING JUDGMENT ON THE JURY'S VERDICT IN VIOLATION OF FED. R. CIV. P. 59(e).

Although Swift-Eckrich labeled its Motion as a Rule 59(e) motion to alter or amend the attorney fee judgment entered on April 9, 2003, the Motion must be denied, because it also belatedly seeks to amend the first judgment entered on the jury's verdict. Swift-Eckrich seeks to consolidate both judgments, and therefore both judgments necessarily will change.

Federal Rule of Civil Procedure 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Likewise, Rule 6(b) specifically prevents the Court from extending the time to file a Motion under Rule 59(e). Fed. R. Civ. P. 6(b) ("but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them"). The Court simply has no discretion to consider matters affecting the judgment after this ten day period has passed. 4B Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Proc.: Civil 3d*, § 1167 at 562-564 (3d ed. 2002); *see Collard v. United States*, 10 F.3d 718, 719 (10th Cir. 1993) ("A trial court may not extend, sua sponte or otherwise, the time for a party to

file a Rule 59(e) motion when it enters an amended judgment solely to award costs. Rule 6(b) expressly prohibits a trial court from extending the time to file such a motion."); *see also In re Home & Family, Inc.*, 85 F.3d 478 (10th Cir. 1996).

The parties agreed to a judgment on the jury verdict, and that judgment was filed on March 27, 2003. Swift-Eckrich filed a motion for remittitur or new trial on April 10, 2003. Swift-Eckrich did not raise the present issue in its April 10 Motion, and therefore the Court has no authority to alter the March 27, 2003 judgment, even if it also would be amending the April 9th judgment.

II. SWIFT-ECKRICH'S "RULE 59(e)" MOTION SEEKS NO RELIEF AVAILABLE UNDER THE RULES AND SHOULD BE DENIED.

Swift-Eckrich contends that the recent amendment to Rule 58(a)(1) eliminates the requirement that the attorney fee judgment be set forth on a separate document. But Swift-Eckrich misreads the rule. It only applies in conjunction with the filing of a motion for attorney fees, which did not occur in this case. Without such a motion, the "separate document" exception for attorney fee judgments does not apply.

Rule 58(a)(1) states as follows:

> (1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a *motion*:

* * * * * *

(C) for attorney fees under Rule 54;
(Emphasis supplied.)

The parties here *stipulated* "that judgment in the sum of $1,022,445 may be entered in favor of Plaintiffs and against Defendant as a reasonable attorney fee pursuant to 15 U.S.C. § 15." Rule 58(a)(1)(C) is simply inapplicable.

Likewise, Rule 58(c) makes clear that the Rule does not apply to attorney fee judgments unrelated to a motion for attorney fees. It states as follows:

(c) Cost or Fee Awards.

(1) Entry of judgment *may not be delayed*, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a *timely motion for attorney fees* is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59. (Emphasis supplied.)

There simply is no procedural device available to the Court which would allow the consolidation of the judgments. In fact, the Court properly entered judgment on the jury's verdict without awaiting resolution of the fee award, because

there was no motion for attorney fees pending. Nothing in the rules would allow the Court to re-open its first judgment to consolidate it with a second attorney fee judgment.

The Federal Circuit, as with all circuits, regularly addresses cases in which two judgments are entered, one on the merits and one on fees. The Federal Circuit, as with all circuits, will merely consolidate the appeals. Rule 3(b)(2), Fed. R. App. P.; *see also Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980). The court of appeals will not require separate briefing on the attorney fee judgment when Swift-Eckrich's sole contention is that if they prevail on appeal, Unitherm is not the prevailing party.

If Swift-Eckrich's Motion is construed as a Rule 59(e) Motion, the time for appeal has been stayed pursuant to Fed. R. App. P. 4(a)(4). The time for filing a notice of appeal on the two judgments would be different, therefore, only if the Court ruled upon the two pending motions at different times. If the Court resolves both motions at the same time, there will be no alleged complications in the scheduling on appeal - a single notice of appeal will suffice.[1] (Plaintiffs do not concede that the instant Motion is effective as a Rule 59(e) motion under Fed. R. App. P. 4(a)(4) to extend the time for appeal on the attorney fee judgment.)

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[1] Indeed, the briefing on Defendant's first post-trial motion closed only recently. On April 30, 2003, Defendant filed a motion for leave to file a reply brief with reference to its first post-trial motion. The Court granted Defendant's motion for leave to reply and gave Defendant until May 7, 2003, to do so. Defendant filed its reply brief on that date.

The only other issue raised by Swift-Eckrich is the purported need to post two separate bonds.[2] There is simply no requirement under the Rules that two bonds be posted. Further, Plaintiffs do not object to the posting of a single supersedeas bond to cover both the damages judgment and the attorney fee judgment. Plaintiffs do, however, advise that the bond should also include the amount of $28,891.05 awarded on the agreed bill of costs.

Even if there was a lawful method to give Swift-Eckrich the result it seeks - and there isn't - it would not be a prudent judicial act. Swift-Eckrich contends, incorrectly, that an amended and consolidated judgment would serve the interests of judicial economy and procedural efficiency. Given the history of this litigation, one may justifiably be skeptical as to whether this is a serious concern of Swift-Eckrich. Swift-Eckrich argues that such an amendment will not prejudice the Plaintiffs. Nevertheless, it never contacted the Plaintiffs to determine whether Plaintiffs object to the consolidation of the judgments. This set of affairs is at least puzzling and is a sufficient grounds for the Court and Plaintiffs to question the motives for filing this Motion as a Rule 59(e) Motion.

Plaintiffs submit there is a risk that entering an amended and consolidated judgment would actually complicate the procedure before both this Court and the Federal Circuit. By seeking an amended judgment, Swift-Eckrich may be

[2] This apparent afterthought by Defendant is even more puzzling in view of its statement on the *first* page of its motion that, "Defendant proposes to post *a supersedeas bond* in the amount of the damages award plus $1,022,445 (the amount of the stipulated attorney fee award)." (Emphasis supplied.)

attempting to give itself another bite at the apple regarding its post-trial motions. Swift-Eckrich may well believe the entry of an amended judgment consolidating the two judgments in this case will "restart the clock" on its post-trial motions. The law surrounding amended judgments - and when and if additional post-trial motions may be filed when such judgments are entered - invites controversy. The case law is unclear on when alterations to judgments are treated as substantive. *See Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (altered judgment is a new judgment with new periods of time to file post-trial motions); *see also McNabola v. Chicago Transit Authority*, 10 F.3d 501, 520-21 (7th Cir. 1993), *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064-66 (7th Cir. 1992). Non-substantive alterations to judgments ordinarily do not restart the clock. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212, 73 S. Ct. 245, 248-249 (1952) ("[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."); *Blue Mt. Invs., Ltd. v. Bone*, 100 F.3d 967 (unpublished disposition) 1996 WL 658101 (10th Cir. Nov. 13, 1996) (non-substantive amendments do not toll deadlines); *Offshore Prod. Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990) (amendment tolls deadline only where it "has disturbed legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality"). But Plaintiffs submit that confusion on this point should not be invited as Swift-Eckrich suggests. If Swift-Eckrich attempted to file new motions under Rules 50 or 59 ten days after the entry of an amended judgment, both this Court and ultimately the

Federal Circuit would have to resolve whether such motions are allowed. This will not simplify the issues or procedure in this case.

III. PLAINTIFFS DO NOT OBJECT TO THE ENTRY OF A SUPERSEDEAS BOND IN THE AMOUNT OF $19,052,336.05.

Notwithstanding ConAgra Foods' $27.6 billion in sales for 2002,[3] Rule 62 requires Swift-Eckrich to post a bond to stay execution on the judgments in this case. Fed. R. Civ. P. 62. The appeal in this case will likely be time-consuming and Plaintiffs are not required to rely upon Swift-Eckrich's continued viability as a business in the present economic and corporate climate to secure its judgments. Plaintiffs do not object to the entry of a supersedeas bond in the amount of $19,052,336.05 (i.e., judgment of $18,000,000, judgment of $1,022,445, and costs award of $29,891.05).

IV. SUMMARY.

Swift-Eckrich's Motion requests a result that is not allowed under the Federal Rules of Civil Procedure. Even if such a result was allowable, it would inject confusion into a situation where no confusion currently exists. Swift-Eckrich's Rule 59(e) Motion should be denied.

Plaintiffs do not object to Swift-Eckrich posting a supersedeas bond in the amount of $19,052,336.05.

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[3] Swift-Eckrich's Brief contains an apparent clerical error in that it relates its sales in 2002 as being only $27.6 million.

Dated: May 12, 2003

Respectfully submitted,

s/ Greg A. Castro
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Attorneys for Plaintiffs

APPENDIX N — ORDER (RE DEFENDANT'S MOTION TO AMEND JUDGMENT ENTERED ON APRIL 9, 2003, PURSUANT TO FED. R. CIV. P. 59(e) AND TO SET AMOUNT OF SUPERSEDEAS BOND FILED MAY 23, 2003 (R. A6525-6528)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC.,
an Illinois corporation; and
JENNIE-O FOODS, INC.,
a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

ORDER

Before the Court is Defendant's "Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond." Plaintiffs filed a Response and the matter is now at issue.

Appendix N

Defendant requests the Court to enter an Amended Judgment combining the March 27, 2003, merits judgment with the April 9, 2003, judgment reflecting the stipulated attorneys' fees award. According to Defendant, entering a combined judgment will promote judicial economy and convenience because it will allow the matter to proceed to the Federal Circuit as a single appeal. Defendant argues' that because of the pending Motion for Remittitur, the appeal on the attorneys' fees issue will be due before the merits appeal. Defendant asserts that the filing of a single judgment will save time and effort by both the parties and the appellate court.

Plaintiffs object, arguing Defendant's proposal creates a plethora of problems. First, Plaintiffs argue because Defendant's request would require the Court to modify the March 27 judgment, the request is untimely since it was not made within 10 days of entry of that judgment. Plaintiffs also argue that no change will occur in the appeal process if a single judgment is entered. According to Plaintiffs, if things remain as they are, the Federal Circuit will simply consolidate the two appeals and they will proceed as a single event. Plaintiffs also note that Defendant's attorneys' fees appeal is based solely on Plaintiffs not being a prevailing party and therefore will be resolved entirely by the ruling on the merits appeal. Finally, Plaintiffs express concern that Defendant's true intent is to reopen the post-trial motion process. Plaintiffs argue that if a new judgment is entered, the time limits for filing post-trial motions will be reopened and then this Court and the appellate court will have to deal with the additional issues raised as a result.

Appendix N

Plaintiffs' argument with regard to the timeliness of the motion is well taken. The amendment sought by Defendant would in fact have the effect of altering the Court's March 27 judgment. Because the present motion was not filed until April 23, 2003, it was not timely as to the March judgment. The ten-day limit set by Fed. R. Civ. P. 59 is jurisdictional and cannot be altered by the Court. *See* Fed. R. Civ. P. 6(b):

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Accordingly, the Court is without power to consider Defendant's request and it will be denied.

Even had Defendant timely filed the motion it would be denied. The Court fails to see how creating a single judgment would result in any savings in the time and effort of either the appellate court or the parties. Indeed, as Plaintiffs note, this situation is fairly routine as; more often than not, the issue of attorneys' fees is not resolved until well after judgment on the merits is entered.

Defendant also requests the Court to set any supersedeas bond at $19,022,445.00. Defendant argues that there is no need for any bond as they clearly have the assets to satisfy the judgment. Plaintiffs do not object to the proposed bond amount but argue that Defendant should be required to post the bond.

Appendix N

The Court agrees that although Defendant currently has adequate assets to satisfy any judgment, there is no certainty that its financial condition will remain the same. Accordingly, if Defendant seeks a stay pending appeal, a supersedeas bond in the agreed amount must be posted.

As set forth more fully herein, Defendant's Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) and to Set Amount of Supersedeas Bond is DENIED in part and GRANTED in part. Defendant's request to amend the judgment is denied. The Court sets the amount of the supersedeas bond at $19,022,445.00.

IT IS SO ORDERED this 23rd day of May, 2003.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX O — ORDER (DENYING DEFENDANT SWIFT-ECKRICH'S MOTION FOR REMITTITUR REDUCING DAMAGE AWARD ON ANTITRUST COUNT, OR, IN THE ALTERNATIVE FOR NEW TRIAL ON ANTITRUST DAMAGES) FILED JUNE 4, 2003 (R. A6529-6531)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-01-347-C

UNITHERM FOOD SYSTEMS, INC.,
an Illinois corporation; and
JENNIE-O FOODS, INC.,
a Minnesota corporation,

Plaintiffs,

v.

SWIFT-ECKRICH, INC. d/b/a CONAGRA REFRIGERATED FOODS, a Delaware corporation,

Defendant.

ORDER

Before the Court is Defendant Swift-Ekrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative for New Trial on Antitrust Damages Plaintiffs filed a Response, to which Defendant filed a Reply. The matter is now at issue.

Appendix O

Pursuant to Fed. R. Civ. P. 59(e), Defendant requests the Court to enter a remittitur reducing the antitrust damages awarded to Plaintiffs from $6 million to $2 million. Defendant further requests that in the event Plaintiffs reject the remittitur, the Court grant its alternative motion for a new trial on the amount of antitrust damages.

Defendant's motion must fail because Defendant has failed to demonstrate any inconsistency or error in the verdict. Defendant's argument is premised on the fact that the evidence on damages did not distinguish between the alternative claims for relief and therefore the damage award for each claim, should have been identical. However, Defendant's argument ignores the fact that the jury instructions permitted consideration of differing parts of the testimony in determining the proper amount of damages for each claim. Under the instructions as given to the jury, damages on the antitrust claim could be awarded for lost profits caused by Defendant's conduct and for any loss of market share caused by the conduct. On the other hand, damages on the intentional interference claim were to be measured only by the amount of money that would compensate Plaintiffs for the loss of the economic relationship. Clearly, the instructions permitted the jury to award damages for a greater spectrum of injury on the antitrust claim. Thus, it was entirely possible for the jury to have awarded a significantly larger figure for the antitrust claim. "When reviewing claims that a jury verdict is inconsistent, we must accept any reasonable view of the case that makes the jury's answers consistent." *Patton v. TIC United Corp.*, 77 F.3d 1235, 1241 (10th Cir. 1996) (citing Palmer v. City of Monticello, 31 F.3d 1499, 1505 (10th Cir. 1994)).

Appendix O

Defendant's argument is limited to the alleged inconsistency of the verdict. Defendant does not assert the $6 million award was not supported by the evidence. Indeed, Plaintiffs offered evidence demonstrating a much larger amount of damages. "It is within the virtually exclusive purview of the jury to evaluate credibility and fix damages." *United Int'l Holdings Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1230 (10th Cir. 2000). Accordingly, there is no basis to reduce the jury's award.

In the absence of any evidence demonstrating the verdict is the result of a manifest error of law, and considering that the jury's verdict can be reconciled with the evidence and the instructions, the Court finds Defendant Swift-Ekrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative for new Trial on Antitrust Damages should be and is DENIED.

IT IS SO ORDERED this 4th day of June, 2003.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX P — COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, SUBMITTED BY PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. AND JENNIE-O FOODS, INC. FILED JULY 26, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1472,-1473

UNITHERM FOOD SYSTEMS, INC.
and JENNIE-O FOODS, INC.,

Plaintiffs-Appellees,

v.

SWIFT-ECKRICH, INC.
(doing business as ConAgra Refrigerated Foods),

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Oklahoma in Case No. 01-CV-347, Chief Judge Robin J. Cauthron

COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, SUBMITTED BY PLAINTIFFS-APPELLEES UNITHERM FOOD SYSTEMS, INC. AND JENNIE-O FOODS, INC.

Appendix P

STATEMENT OF COUNSEL REQUIRED IN FEDERAL CIRCUIT RULE 35(b)

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of the Tenth Circuit Court of Appeals: *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004).

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of this Court: *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098 (Fed. Cir. 2003).

Based on my professional judgment, I believe the Panel Decision is contrary to the precedent of the Tenth Circuit Court of Appeals: *Telecor Communs., Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002).

Burck Bailey
Attorney of Record for Plaintiffs/Appellees

THE POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

1. The point of *law* overlooked or misapprehended by the Panel of the Court is: The law of the Tenth Circuit and the law of the Federal Circuit require a party to move for judgment as a matter of law under Rule 50(a) in order to preserve an issue for appellate review on the ground of sufficiency of the evidence.

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2. The point of *fact* overlooked or misapprehended by the Panel of the Court is: ConAgra did not, in any manner whatsoever, make a Rule 50(a) motion, either pre-verdict or post-verdict, on the issues of relevant market or antitrust injury.

3. The point of *fact* overlooked or misapprehended by the Panel of the Court is: Unitherm presented ample evidence for the jury to determine the relevant market and antitrust injury.

THE ARGUMENT IN SUPPORT OF REHEARING AND REHEARING EN BANC

The Panel vacated the jury's verdict in favor of Unitherm on the antitrust claim and remanded for a new trial' on the ground of the sufficiency of the evidence of relevant market and antitrust injury. ConAgra never raised any contention of sufficiency of the evidence in the trial court as to the issues of relevant market and antitrust injury by a Rule 50(a) motion. Under longstanding, as well as very recent, Tenth Circuit and Federal Circuit law, the failure to make a Rule 50(a) motion in the trial court bars appellate review of these issues. Further, Unitherm presented ample evidence of the relevant market and antitrust injury, and the Panel misapprehended both the facts and the applicable Tenth Circuit law regarding these issues. Consideration of the Panel's Decision by the full Court is necessary to secure and maintain the uniformity of this Court's decisions. Fed. R. App. P. 35(b)(1)(A).

Appendix P

I. CONAGRA WAIVED ITS SUFFICIENCY OF THE EVIDENCE ISSUES AND THE PANEL MISAPPREHENDED BOTH THE FACTS AND THE LAW WITH REFERENCE TO THESE ISSUES.

The Panel Opinion ignores well-established and highly important rules of trial procedure. The trial court was reversed for a ruling it did not make and was never asked to make.

The Panel (Op., p.42, n.7) applied Tenth Circuit law and stated that the failure of a party to move for JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence "provided, *as is the case here*, that the party made *the appropriate motion* prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004)." (Emphasis added). Contrary to the Panel's observation, ConAgra *did not* make the appropriate motion prior to the submission of the case to the jury to challenge Unitherm's definition of the relevant market or Unitherm's proof of antitrust injury. (A5232-5239, 5884).

The *only* statement ConAgra's counsel made with reference to Unitherm's antitrust claim was to express his doubt about the sufficiency of the evidence to prove an intent to deceive the patent office: "Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that

Appendix P

inference."[1] (A5237). Not a word was uttered about the issues of relevant market or antitrust injury.

The Tenth Circuit law set forth in *Cummings* is squarely opposite the conclusion reached by the Panel. The Tenth Circuit held that the moving party must *specify* the basis for its motion:

> In this case, the Cummings moved for judgment as a matter of law with regard to the defense of misuse only and requested a jury instruction on this issue. Counsel did not move for judgment as a matter of law with regard to GM's liability generally . . . . Although technical precision is not required, *the moving party must adequately notify the court of the issues being raised in order to satisfy the purposes of the rule. The Plaintiffs' motion was limited to a motion for judgment as a matter of law on the issue of misuse, and therefore any appeal is so limited.*

365 F.3d at 950 (emphasis added).

The Tenth Circuit stated the reasons for this rule of law:

> A motion under Rule 50(a) protects the Seventh Amendment right to trial by jury. Such a motion alerts the opposing party to any deficiencies in the case, thereby giving the party an opportunity

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[1] Even as to fraudulent intent the comment by ConAgra's counsel was not a specification of "law and the facts on which the moving party is entitled to judgment" as required by Rule 50(a).

to rectify any deficiencies prior to the case being submitted to the jury. A motion for judgment as a matter of law also alerts the court to a claim of insufficient evidence before the case is submitted to the jury so the court is not faced with such a claim after the fact when the court's ability to address the motion is limited. Finally, a motion at the close of evidence preserves the issue as a question of law for appeal.

* * * *

The motion must include *all issues challenged*, as the "failure to move for a directed verdict [now judgment as a matter of law] *on a particular issue will bar appellate review of that issue*."

Id. at 949 (emphasis added; citation omitted).[2]

Moreover, regardless of whether Tenth Circuit or Federal Circuit law is applied here, the result is the same. The very Federal Circuit case cited by the Panel in its Opinion (p.42, n.7), *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098 (Fed. Cir. 2003), stands for exactly the same rule of law stated in *Cummings*, *i.e.*, the failure to raise sufficiency

[2] *See also United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, (10th Cir. 2000), where judgment was entered in favor of plaintiff for $125,000,000. On appeal, Wharf contended the evidence at trial was insufficient to sustain the compensatory damages award of $67,000,000. The Tenth Circuit held the argument was waived because Wharf did not specifically raise the issue in its motion for directed verdict at the close of the evidence. *Id.* at 1228-29.

of the evidence regarding an issue by JMOL constitutes a waiver. Duro-Last filed a *post-verdict* motion contesting sufficiency of the evidence on obviousness. But Duro-Last did not include obviousness in its *pre-verdict* motion for JMOL.

> Custom Seal asserts that Duro-Last waived its right to file a post-verdict JMOL motion on obviousness because its pre-verdict JMOL motion raised only the issues of inequitable conduct and the on-sale bar.

Id. at 1106.

The *Duro-Last* court held that a Rule 50(a) motion pre-verdict must *specifically* raise the issue, and cannot be raised, for the first time, post-verdict:

> The requirement for specificity is not simply the rule-drafter's choice of phrasing. In view of the litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL.
>
> * * * *
>
> Duro-Last's JMOL at the close of evidence clearly raised only the inequitable conduct and on-sale bar issues. Since a post-trial motion for JMOL can be granted only on grounds advanced in the pre-

> verdict motion, Duro-Last was precluded from making a post-trial motion under Rule 50(b) for JMOL that its patents were not invalid for obviousness . . . .

Id. at 1106, 1108.

ConAgra's complaints about sufficiency of the evidence on the issues of relevant market and antitrust injury were raised for the first time on appeal. ConAgra did not alert Unitherm or Judge Cauthron to these purported deficiencies at the time Unitherm had an opportunity to rectify them. ConAgra's failure to comply with Rule 50(a) perpetrated unfairness on Unitherm and on the trial court. Thus, the Panel's Opinion finding that ConAgra did not waive its sufficiency of the evidence issues, when ConAgra utterly failed to raise them in the trial court, cannot be squared with Tenth Circuit law or with this Court's recent pronouncement of the law in *Duro-Last*.[3]

[3] Notably, ConAgra also never raised an issue of technical substitution as opposed to economic substitution, in either its Opening Brief or its Reply Brief. Unitherm was not put on notice that this concept was at issue when it was preparing its Answer Brief and designating portions of the record for appeal. Unitherm was prejudiced not only by the omission of any pertinent motion in the trial court, but also the omission of any such argument in ConAgra's briefs in the appellate court.

II. THE PANEL MISAPPREHENDED THE LAW AND THE FACTS REGARDING THE RELEVANT MARKET AND ANTITRUST INJURY.

The Panel's statement that, "ConAgra's inability to attract any licensees is indicative of a lack of pricing power, *the* single most important element in defining a relevant antitrust market" (Op., p.40, emphasis in original), misses the economic reality in this case and misstates Tenth Circuit law. When ConAgra fraudulently obtained its patent, it sought to impose a massive price increase of 10¢ a pound, which it knew that no one could possibly pay. (A3603). ConAgra set the royalty unreasonably high for the very purpose of restricting output. ConAgra did not want any takers, it wanted others to go away. The fact that other food processors did not license the patent is evidence of successful monopolization, not the other way around. And, there is the irony that ConAgra purported to offer a license only to non-infringers, but it sent its letters only to those who *had* infringed. (A4483-84, 4487-91, 3748-59). Thus, by definition, a license was not being offered to Jennie-O, the entity ConAgra sued for infringement.[4]

By the Panel's logic, as long as a patentee raises prices so high that no one can afford to buy the patented process, there is no "pricing power" and thus no relevant market. This

[4] The Tenth Circuit has defined "market power" as "*either* the power to control prices *or* the power to exclude competition." *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 966 (10th Cir. 1990)(Tenth Circuit's emphasis). The standard identified by the Panel relating to "market power" is, in fact, the standard for "monopoly power," which is *not* an element of a Section 2 attempt to monopolize.

results in bizarre public policy. The holder of the patent monopoly can, by establishing a price so high no one can reasonably pay it, insulate itself from antitrust liability. There will be no "transaction" in the market and, *ipse dixit*, there is no market.

In December of 1996, Unitherm sent letters to ConAgra and Jennie-O discussing the economic benefit of the Unitherm/patented process as compared to the conventional batch process which the industry was using at the time. (A4754-55, 3728-29). At an operating rate of 112,000 pounds of product per day (*i.e.*, 7000 pounds per hour at 16 hours per day), the economic benefit of the patented process is $6000 per day. *Id.* This translates into 5.35¢ a pound. The economic significance of this benefit and the impact and importance of the patented process in the industry are thus readily apparent in light of the unrefuted testimony of Jennie-O's president that "the food industry in general . . . is a business of pennies" and that Jennie-O's overall company-wide profit in the year prior to trial was only about 3¢ a pound. (A3603).

By the time the industry began converting to the patented process and ConAgra filed its bogus patent application, there clearly would have been considerable price elasticity of demand had ConAgra offered a reasonable royalty. A royalty of 10% of the gross economic benefit of the process would be about a half cent per pound and would be equivalent to about 18% of Jennie-O's average overall profit margin of 3¢ a pound. A royalty of 20% of the gross economic benefit would be about 1¢ a pound. But even a demand for 20% of the process's impressive economic benefit was not enough

for ConAgra's true purpose. ConAgra demanded a royalty amounting to almost twice the economic benefit of the process and more than three times Jennie-O's average margin on all products. The jury clearly understood the import of the testimony of Jeffrey Ettinger, the President of Jennie-O, that "to have to pay 10-cent-a-pound royalty on a product line makes you very uncompetitive very quickly." (A3603). At Jennie-O's production rate, their royalty payment to ConAgra would have been $1.8 Million a year, escalated annually over many years. (A3600, 3602).

Contrary to the Panel's Opinion (p.39), the record evidence shows that there are no reasonable substitutes and that the process provides very large, real economic benefits. In fact, the record is filled with evidence that the patented process significantly increases product yield (typically by at least 4%), reduces labor costs, increases production capacity, reduces chilling costs, reduces heat input into the product, reduces injection requirements, improves product safety, and increases product shelf life. (*See, e.g.*, A3350-52, 3464-65, 3504-06, 3728-29, 4384, 4386, 4396, 4402-09, 4472, 4709-25, 4754-55, 5132-33). These benefits are all acknowledged by ConAgra in the patent itself. (*See, e.g.*, Add. 31, Col.2:16-36,47-50 and Add. 34-35).

Moreover, Mike Benson, who is Jennie-O's vice president of R&D and is responsible for food safety (A3502), testified that Jennie-O could *not go back to using the batch process if it were required to stop using the Unitherm process* "because of the added food safety risk. In 1999 the [USDA, Food Safety Inspection Service] FSIS published a guideline for the cooling of products and the control of temperature in

the products, and the old process would not meet their guidelines without significantly altering the product." (A3505-06).

The record also shows that caramelization and deep frying are not acceptable substitutes for the patented process. ConAgra explains in the patent that the consumer demand is for wholesome, healthful, nutritional products which are *not fried* and which are low in fat and have the look, taste, and texture of their home-cooked counterparts. (Add. 31, Col. 1:19-26 and Col. 2:36-44).

> There are numerous drawbacks to deep-frying foods . . . . They include a residual oily flavor and mouthful, as well as adverse characterization of the product as being a high fat product, because of the oil that remains embedded in the product's surface. Moreover, the oil can degrade over time, thereby affecting the product's shelf life and taste.

(Add. 31, Col. 1:44-50).[5]

Concerning the caramelization process, Syed Hussain admitted that it does not produce a golden-brown product. (A3280). Arnold Mikelberg, former President of Swift-Eckrich also testified that caramelization will not produce a golden-brown color. Rather, the product has a dull muddy color and does not have a crispy appearance. (A3354-55).

[5] Additional record cites also support that there in fact were no acceptable substitutes. (*See* Add. 31, Col.1:19-26, Col.1:27-31, Col.1:44-50, Col.2:36-44; A3280, 3339-44, 3354-55, 3669-70, 4220, 5133-34, 5172).

Consistent with ConAgra's claims and admissions in the patent, Mikelberg also testified that the Unitherm process produces an excellent product which is richer in color than ConAgra's prior Jonesboro product. (A3354). As stated by Bob Wood, Jennie-O's Senior VP of Operations, the product from the Unitherm process *is* the premium product. (A3586). Even ConAgra's own counsel acknowledged that the batch process is an old fashioned and inefficient process. (A5177).

ConAgra got a patent on a cost-saving process which gave ConAgra a huge economic advantage over its rivals. Obviously, ConAgra did not charge itself the oppressive royalty. ConAgra controlled the relevant market, a market with no economic substitutes, and used its illegally-acquired monopoly to put its rivals in the sale of the process, including Unitherm, out of the browning line business.

However, rather than granting Unitherm and the jury the benefit of any reasonable economic inference based upon the record as a whole, the Panel isolated certain testimony and drew inferences in favor of ConAgra that these are merely "technological" facts without any economic consequences. This is not the proper standard of review. *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1073 (10th Cir. 2002). It is undeniable that these facts have economic consequences from which reasonable inferences about the market may be drawn. As the Panel noted, "Market definition and antitrust injury . . . are intensely factual determinations." (Op., p.11). These issues were left by the trial court to the jury pursuant to instructions that were not objected to by ConAgra.

In addition, the Panel mistakenly opined, "Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in *his* proposed relevant market." (Op., p. 40; emphasis supplied). Not so. Mangum merely testified that a different, hypothetical market conjured up by ConAgra's counsel did not exist.

> Q. Well, how could there be harm to a market that doesn't exist?
>
> A. I said the market *you described* doesn't exist. I've described a market that very much exists. (Emphasis supplied).

(A5154). Mangum testified:

> The relevant market, or the relevant antitrust market in this case, I've determined, is a process for browning precooked whole muscle products by coating with a browning agent and applying sufficient heat to brown the product without substantial shrinkage. The embodiment of this process in this case is a browning line oven system.

(A5132). In fact, Mangum testified that there were transactions in the relevant market. (A5152, 5154-55).

More importantly, the Panel itself identified numerous transactions in the market when it affirmed invalidity of the Patent under § 102:

> Unitherm also submitted evidence that, prior to the critical date of May 11, 1997, it had sold both its RapidFlow ovens and the process that it had been demonstrating. In addition to its 1995 sale to Jennie-O, Unitherm proved sales to Thorn Apple in 1995 and to Hudson Foods in 1996. Unitherm further proved that Plantation ordered a Unitherm system on February 7, 1997 and that Foster Farms ordered a system and made its first payment by May 9, 1997. Jennie-O's Robert Wood testified that the process that Jennie-O purchased from Unitherm "was able to prepare the surface, apply liquid smoke and set liquid smoke." The demonstrations to ConAgra alone suggest that ConAgra was aware of the Unitherm process for at least several years prior to the critical date.
>
> * * *
>
> Unitherm's sale of both product and process to Hudson was among the district court's key undisputed prior sales.

(Op., pp. 19, 21).

Further, the Panel misapprehended Mangum's testimony by confusing the market for processes with a market for food products, a confusion perpetrated unsuccessfully by ConAgra at trial. The Panel stated:

> [Mangum] also, however, concluded that pre-cooked turkeys prepared using the patented

> process competed with pre-cooked turkeys not prepared by the patented process at the retail level, but somehow not at the wholesale level. [Mangum] never explained this seeming anomaly.

(Op., p.39).

But Mangum expressly testified "there are no food products in the relevant market." (A5167, 5172). Of course, pre-cooked turkey produced by the patented process competes with tuna salad at the retail level. But, consumers of food products are not customers or potential customers for the patented process. A food processor could not compete on equal footing with ConAgra in producing the precooked, whole muscle, golden-brown turkey product to the wholesale trade if it was foreclosed from receiving the cost and yield benefits of the patented process.

Unitherm's proof fit precisely into the concept outlined by the Tenth Circuit in *Telecor Communs., Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002). Southwestern Bell argued that the market "should be evaluated from the viewpoint of the end-user of the phone services and should therefore include both pay phones and cell phones, which Southwestern Bell argued were reasonably interchangeable at the end-user level." *Id.* at 1129. In rejecting this definition of the relevant market, the Tenth Circuit implicitly rejected the definition urged by ConAgra, *i.e.*, that the market is to be tested at the consumer level. Instead, the Tenth Circuit held the relevant market was a location-owner level, *i.e.*, the equivalent of the market for the patented process, where ConAgra's anti-competitive behavior took place and where price was raised and output reduced.

> Location owners are the relevant customers for purposes of locating Southwestern Bell's pay phone facilities, and from the location owners' perspective cellular phone services and pay phone services are not interchangeable.

Id. at 1136.

A reasonable inference is likewise available here: From the perspective of food processors, the batch process is not interchangeable with the patented process. From an economic perspective, the batch process is not a reasonable substitute for the patented process. The *Telecor* court stated: "It is well settled that defining the relevant market is an issue of fact." *Id.* 1131. In the case at bar, the jury had ample evidence of the absence of reasonable substitutes for the Unitherm (patented) process.

Further, the injury to Unitherm was not merely damage to a single competitor. It was injury across the market inflicted upon any competitor intending to sell a system for performing the process or any purchaser wanting to employ the process using a Unitherm system or a system from another supplier. (A5139-40). ConAgra's actions affected a market in an anti-competitive way. *That* is antitrust injury.

Appendix P

III. CONCLUSION

Based upon the foregoing, this Court should grant a rehearing or rehearing en banc and reinstate the judgment in favor of Unitherm on its antitrust claim.

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APPENDIX Q — EXCERPTS FROM CONAGRA'S MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 11, 2002 (R. A0248-0252)

* * *

V. UNITHERM'S ANTITRUST CLAIM SHOULD BE DISMISSED BECAUSE UNITHERM IS NOT A COMPETITOR OF SWIFT-ECKRICH.

Unitherm cannot succeed on its antitrust claims against Swift-Eckrich because it is not a competitor of Swift-Eckrich. *Associated Gen. Contractors*, 459 U.S. at 539. Unitherm identifies the relevant market as "**the market for sliceable cooked turkey products** sold in interstate commerce throughout the entire United States." (First Amended Complaint, ¶ 149, Exhibit 1) (emphasis added).[4] However, unlike Swift-Eckrich, Unitherm is not in the business of producing "sliceable cooked turkey products;" it sells ovens. In fact, Unitherm has admitted that it does not compete with Swift-Eckrich:

> Q: Now, you're not com-- you don't compete with Swift-Eckrich, do you?
>
> A: No.
>
> Q: You sell ovens and they sell food; right?
>
> A: That's correct.

(Howard Depo., 128:19-23, Exhibit 3).

[4] In response to Interrogatory No. 12, Exhibit 2, Jennie-O identifies the relevant market as "the market for browning and/or smoking precooked (typically cooed 'in-bag') whole muscle turkey products sold in interstate commerce throughout the United States."

Appendix Q

The Supreme Court requires a "determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors*, 459 U.S. at 534-35 & n.31. In analyzing whether the plaintiff has antitrust standing, the Supreme Court examined whether the plaintiff is a consumer or a competitor in the relevant market. *See Associated Gen. Contractors*, 459 U.S. at 539 (denying antitrust standing to party that was "neither a consumer nor a competitor in the market in which trade was restrained"). The Circuit Courts of Appeal, following this mandate, limit standing to competitors and consumers. *See Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999) (plaintiffs cannot "avoid the fundamental requirement for antitrust standing that he or she have suffered an injury of the type -- almost exclusively suffered by consumers or, competitors -- that the antitrust laws were intended to prevent"); *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995) (a competitor or a consumer in the "relevant market" is "the presumptively 'proper' plaintiff"); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597-599 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 042 (1996) ("'An appropriate balance [between deterrence and excessive damages] is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injures . . .'"); *Int'l Raw Materials Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1328-29 (3th Cir. 1992) (denying standing to a soda ash operator because the operator was neither a consumer nor a competitor in the sale of soda ash); *S.D. Collectibles, Inc. v. Plough, Inc.* 952 F.2d 211, 213 (8th Cir. 1991) ("The antitrust laws were designed to protect competition and therefore standing is generally limited to actual market participants, that is, competitors or

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consumers"); *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1183 (5th Cir. 1988) ("Restraint in the market affects consumers: and competitors in the market; as such, they are the parties that have standing to sue").

Some courts reject claims of plaintiffs who are neither competitors nor consumers in the market on the basis that the plaintiff cannot show an antitrust injury, which is an essential element of standings.[5] *See Automated Salvage Transp., Inc. v. Wheelabrator Envtl Sys., Inc.*, 155 F.3d 59, 65 (2nd Cir. 1998) ("The requirement that the alleged injury [to plaintiff] be related to anti-competitive behavior requires, as a corollary, that the **injured party be a participant in the same market** as the alleged malefactors") (emphasis added) (*citing Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *Serfecz*, 67 F.3d at 599.

Other courts reject the antitrust claim of a plaintiff, who is neither a competitor nor a consumer, on the grounds that the plaintiff cannot state a claim for unlawful monopolization under § 2 of the Sherman Act.[6] Unlawful monopolization

[5] Tenth Circuit holds that to maintain standing to bring an antitrust claim under the Clayton Act, a private plaintiff must show (1) an antitrust injury, and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws. *Sports Racing Servs., Inc. v. Sports Car Club of Am.*, 131 F.3d 874, 882 (10th Cir. 1997).

[6] Section 1 of the Sherman Act requires the existence of a contract, combination or conspiracy that unreasonably restrains trade. The First Amended Complaint, however, does not allege such facts. Swift-Eckrich, therefore, assumes that Plaintiffs allege a violation of § 2, not § 1, of the Sherman Act.

requires existence of monopoly power and anticompetitive conduct. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999) (*citing* Phillip E. Areeda & Herbert Hovernkamp, *Antitrust Law*, § 650a, at 66 (1996). In order to be actionable, anticompetitive "conduct must be directed toward competitors and must be intended to injure competition." *Intergraph*, 195 F.3d at 1353 (emphasis added). *See Ad-Vantage Te. Dir. Consult. v. GTE Directories*, 849 F.2d 1336, 1348 (11th Cir. 1987) ("In order to demonstrate 'an area of effective competition' one must establish a competitive relationship"); *Orthopedic Studio, Inc. v. Health Ins. Plan*, 1996 U.S. Dist. LEXIS 10321, at *14 (E.D.N.Y. Feb 9, 1996) ("Because the plaintiff and HIP are not competitors in the relevant market . . . the plaintiff cannot allege a claim under Section 2 of the Sherman Act.").

Whether couched as an inability to demonstrate antitrust standing, antitrust injury[7] or anticompetitive conduct, the fact that Unitherm is not a competitor of Swift-Eckrich (or a consumer in the relevant market)[8] is fatal to Unitherm's antitrust claims.

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[7] "Antitrust standing and its terminological cousin, antitrust jury, are often confused. Both concepts, however, share a common ingredient, 'confin[ing] recovery to those who have been injured by restraint on competitive forces in the economy." *Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 247 (2nd Cir. 1985). *See also Sharp v. United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir. 1992).

[8] Unitherm does not allege that it is a consumer of sliceable hooked turkey breasts. Nor does Unitherm allege that consumers of sliceable cooked turkeys breasts have been damaged by Swift-Eckrich's alleged anticompetitive acts.

Nor can Unitherm create standing, and thus avoid summary judgment, by claiming that it is a supplier to Jennie-O and other competitors of Swift-Eckrich. Standing has been denied to antitrust plaintiffs that were merely suppliers to the defendant's competitors. *See SAS of Puerto Rico, Inc.*, 48 F.3d at 44-45 ("In general . . , a supplier . . . is held not to have suffered 'antitrust injury,'" explaining that supplier's customer "is the immediate victim and the preferred plaintiff"); *Serfecz*, 67 F.3d at 597 ("suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered 'antitrust injuries'"); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 186-89 (2nd Cir. 1970) (standing denied to plaintiff that licensed information and supplied ingredients to competitor of alleged monopolist); *Razin v. Bluff Cross & Blue Shield of Kate*, 635 F. Supp. 1287, 1318 (D. Kan. 1986), *affd*, 899 F.2d 951 (10th Cir.), *cert. denied.* 497 U.S. 1005 (1990) (physician not allowed to attack defendants impairing the patronage of a hospital at which he practiced). *See also* Phillip E: Areeda & Herbert Hovernkarmp, *Antitrust Law.* § 375d (1995) (antitrust victims' suppliers generally lack antitrust standing, unless she competes with the defendant).

Since Unitherm does not compete with Swift-Eckrich in the relevant market, it cannot maintain an antitrust claim against Swift-Eckrich. Therefore, the court should grant Swift-Eckrich's motion for summary judgment on Unitherm's Eleventh and Twelfth Causes of Action.

* * * *

APPENDIX R — EXCERPTS FROM COURT'S ORDER ON SUMMARY JUDGMENT MOTIONS FILED AUGUST 10, 2002 (R. A2693-2695)

* * *

B. Defendant's Motion for Summary Judgment

1. Antitrust Violations

Defendant argues that the two Plaintiffs' antitrust claims cannot succeed for different reasons: 1) Unitherm is not a competitor of the Defendant in the market for sliceable cooked turkey products; and 2) Jennie-O cannot show any antitrust injury as a result of any action of the Defendant. The Court agrees only with the later and discusses each argument separately below.

a. Unitherm

The Sherman Act § 2 states, in relevant part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."

15 U.S.C. § 2.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

The Clayton Act states, in relevant part:

> "[A]ny person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount ,in controversy, and shall recover threefold the damages by him sustained. . . ."

15 U.S.C. § 15.

ConAgra argues that Unitherm cannot succeed on its antitrust claims because Unitherm is not a competitor of ConAgra and thus has no antitrust standing. The Court finds that the law is not as ConAgra argues it to be.

In Walker Process Equip. v. Food Mach. & Cheat. Corp., 382 U.S. 172 (1965), the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the: other elements necessary to a § 2 case arc present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party." *Id.* at 174.

ConAgra denies that it is a competitor of Unitherm, claiming that ConAgra processes meat while Unitherm sells ovens. But, it is undisputed that ConAgra offer; a browning/ smoking process at a royalty of 10¢ per pound and Unitherm offered its browning/smoking process for sale as early as

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1993. And ConAgra's own documents previously produced in this action also support the conclusion that ConAgra is a competitor of Unitherm and that ConAgra is enforcing its patent.

> Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of Our rights under this patent.

Plaintiffs' Brief in Opposition, Exhibit 9 (Letters from ConAgra to 15 prospective purchasers of the Unitherm system).

This Court has already found the reference to "others in the industry" sufficient to put Unitherm under apprehension of a lawsuit for patent infringement -- something which has since come to fruition with the filing of ConAgra's counterclaim. The fact that ConAgra has asserted a counterclaim for patent infringement on an antitrust claim a viable one. *Walker Process*, 382 U.S. 172. The issue yet to be decided is whether ConAgra fraudulently obtained the patent. *See Walker Process, supra.* Thus, the Court finds that the undisputed facts are sufficient to withstand the motion for summary judgment on Unitherm's antitrust claims.[3]

* * * *

[3] Because the Court has upheld Unitherm's antitrust causes of action under federal law, a discussion of the Oklahoma Antitrust Reform Act ("OARA") 79 Okla. Stat. § 205, is unnecessary. *See* 79 Okla. Stat. § 212 ("[OARA] shall be interpreted in a manner consistent with Federal Antitrust Law, 15 U.S.C. § 1, *et seq.* and the case law applicable thereto").

APPENDIX S — EXCERPTS FROM CONAGRA'S TRIAL BRIEF FILED MARCH 3, 2003 (R. A3092-3096)

* * *

B. Even If Unitherm Shows That The '027 Patent Was Obtained By Fraud, It Nevertheless Cannot Prove Violation Of The Antitrust Laws.[3]

Section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (2002).

> The four elements necessary to establish an attempt to monopolize claim are: '(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt.'

TV Comms. Network. Inc. v. Turner Network Television. Inc., 964 F.2d 1022, 1025 (10th Cir. 1992), cert. denied, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1992), *quoting Colorado Interstate Gas Co. v. Natural Gas Pipeline*, 885 F.2d 683, 693 (10th Cir. 1998), cert denied, 112 L.Ed. 2d 424, 111 S. Ct. 441 (1990).

[3] By Order dated August 19, 2002, the Court determined that a separate assessment of the issues under the Oklahoma Antitrust Reform Act is unnecessary because that statute is to be interpreted in a manner consistent with Federal Antitrust Law. Thus, for the sake of brevity, the discussion here sets forth only the standards under the Sherman Act.

"The key inquiry involves the power of the defendant in the market in which it competes," and if the plaintiff cannot "establish the existence of a relevant market and the defendant's power in that market," the claim fails as a matter of law. *See TV Comm. Network*, at 1025-26 (Rule 12 motion granted because plaintiff's alleged market is defective as a matter of law"); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993). Thus, "to establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026 (10th Cir. 2002); *Brown Shoe Co. v. United States*, 370 U.S. 294, 342 (1962). A definition of the relevant market is essential because "without a definition of the market there is no way to measure (the defendant's) ability to lessen or destroy competition." *Walker Process*, 382 U.S. at 177; *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993).

C. Unitherm's Definition Of The Relevant Product Market Is Fatally Flawed.

According to Unitherm, the relevant antitrust market in this case is "the process for browning precooked, whole muscle meat products by coating with a browning agent and apply sufficient heat to brown the product without substantial meat shrinkage." (Mangum Report, p. 6.) Unitherm cannot prevail on antitrust claims premised upon this market definition.

The "relevant market" analysis has two elements: (1) "relevant product market," i.e. the cluster of products or processes with which the defendant's product or service

effectively competes; and (2) "relevant geographic market." *See Brown Shoe*, 370 U.S. at 324. The relevant product .process market must be defined by considering two factors: (1) reasonable "interchangeability of use," i.e., the extent to which the defendant's product is interchangeable in use with alternative products; and (2) "cross-elasticity of demand" between the product itself and substitutes for it. *Brown Shoe*, 370 U.S. at 325.

"Interchangeability of use" refers to "products which are reasonably interchangeable by consumers for the same purposes." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887 (10th Cir. 1991). If purchasers can substitute the processes for one another, the processes are most likely within a single product market. *Id.*; *U.S. v. E.I. du Pont de Nemours*, 351 U.S. 377, 380 (1956); *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 71 (2d Cir. 1984) (product market includes describe "those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other"); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430 (3rd Cir. 1997) (test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes).

"Cross-elasticity of demand" requires refers to the extent to which consumers will change their demand for one product in response to a price change in another. *See Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451, 469 (1992).

Appendix S

1. *There is No Market For The '027 Golden Brown Process.*

A market definition must reflect the reality of the market. *See Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 772 (5th Cir. 1999). In order to establish the existence of a relevant product market, "evidence must be offered demonstrating . . . where consumers currently purchase the product [and] where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Lantec*, 306 F.3d at 1026. When the defendant has no sales in the market as defined by plaintiff, such a market is defined too narrowly. *See Clark v. Flow Measurement*, 948 F. Supp. 519 (D.S. Carolina 1996) ("even more telling to the determination of relevant market is the fact that the specialized markets listed by the plaintiffs represent no sales from Flow Measurement since it was created.").

Here, Unitherm cannot prove the existence of a market for the '027 golden brown process because it has no evidence of any consumer ***demand*** for the process. No one ever agreed to take a license from Swift-Eckrich for the process -- in other words, Swift-Eckrich has no sales in the purported product market, thereby indicating that the plaintiff has defined the market too narrowly. ***Cross-elasticity of demand*** obviously cannot be determined when there was no demand at all, where no willing purchaser or licensee would pay money for the process, and where the price of the process would, therefore, be zero. Accordingly, Unitherm cannot prevail on its antitrust claims based in the product market it has defined.

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2. *If A Product Market Exists At All, Then It Must Include All Commercially Available Browning Processes.*

A relevant product market must consist of something more than the sale of single product to a single customer. *Smalley & Co.*, 13 F.3d at 368; *TV Comms. Network, Inc.*, 964 F.2d at 1025-26 (relevant market as defined was insufficient as a matter of law where TVCN alleged that TNT attempted to monopolize the market for the TNT channel; "a claim cannot lie against [the defendant] for monopolization of its own product"); *see also Colsa Corp. v. Martin Marietta Services, Inc.*, 133 F.3d 853 (11th Cir. 1998) (dismissing plaintiff's antitrust claim because the market defined based solely on defendant's product, a contract, was too narrow).

Here, Unitherm cannot prove the existence of a product market that consists of one player (Swift-Eckrich) with one product (the '027 golden brown process) and zero sales. Unitherm's overly narrow definition of the market is further evidenced by the fact that it has ignored at least five processes that are (and have been for many years) "reasonably interchangeable" with the '027 process for browning whole muscle meat products. Swift-Eckrich will show that any relevant product market for browning processes must include at least five well-known, interchangeable alternatives: (1) oil browning, (2) caramel browning, and (3) smoke-house browning, as well as (4) browning processes that are similar to the '027 process but which produces a product of a color other than "golden brown" (e.g., a "brown" or "roasted" color), and finally, (5) the commercially acceptable alternative of not browning the product at all.

Appendix S

If all of these alternatives are considered and the product market given an appropriately broad definition, Unitherm cannot possibly show that Swift-Eckrich's obtaining the '027 patent (which has now been invalidated) has given it market power, much less a dangerous probability of success of monopolization. *Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1504 (D.S.C. 1987) (market power means the "ability to injure consumers by curtailing output and raising prices"). The mere existence of the '027 patent does not "establish a presumption of market power in the antitrust sense," particularly given the number of substitute processes available to meat processors. *See Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991); *CSU, L.L.C. v. Xerox*, 203 F.3d 1322, 1325 (Fed. Cir. 2000); U.S. Department Of Justice And Federal Trade Comm, *Antitrust Guidelines For The Licensing Of Intellectual Property*, § 2.2 (April 6, 1995). ("although the intellectual property right confers the power to exclude with respect to the specific product, process or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power").

Unitherm's suggestion that Swift-Eckrich was on the brink of exercising domination in a market for turkey browning processes is simply absurd. Between the time the patent issued in 1999 and the time it was invalidated in 2002, Swift-Eckrich failed totally in its efforts to license the '027 process.

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APPENDIX T — EXCERPTS FROM TRIAL TRANSCRIPT DATED MARCH 14, 2003 (R. A4699-4700)

[Commencing at page 925]

* * *

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: Uhm, counsel are not in yet. I have seen them milling around outside. You all are welcome to stay but you need to clean off your tables.

MR. SCHROEDER: Your Honor, may I ask if we will have an opportunity to argue motions at the conclusion of the [926] plaintiffs' case?

THE COURT: Well, of course I have to give you your opportunity to make those motions. What argument I give you will probably depend on whether I think I need argument.

MR. SCHROEDER: Thank you.

THE COURT: Or whether you're likely to win. I'll certainly allow everybody to argue if I think you're going to prevail, and I can almost anticipate what your arguments are going to be at this point. I don't normally need argument, is the short answer, but I never know from time to time.

MR. SCHROEDER: Thank you, Your Honor.

Appendix T

THE COURT: Is there anything from counsel in this case before we're in recess? No?

MR. CASTRO: No, Your Honor.

THE COURT: We're in recess. Counsel are excused.

(THE EVENING RECESS WAS TAKEN)

(PLEASE REFER TO VOLUME VI)

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APPENDIX U — FEDERAL RULE OF CIVIL PROCEDURE 59

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.